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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, APPROPRIATION AUTHORIZATION AND OVERSIGHT

COMPLETED ORIGINAL

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, APPROPRIATION AUTHORIZATION AND OVERSIGHT

FEBRUARY 10, 1982 AND MARCH 2, 1982

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ADMINISTRATIVE CONFERENCE ACT AMENDMENT

WEDNESDAY, FEBRUARY 10, 1982

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, in room 2226, Rayburn House Office Building, Hon. George E. Danielson (chairman of the subcommittee) presiding.

Present: Representatives Danielson, Glickman, and Kindness.

Staff present: William P. Shattuck, counsel; Janet S. Potts, assistant counsel; and James B. McMahon, associate counsel.

Mr. DANIELSON. The subcommittee will come to order.

Would you identify yourselves, please, from right to left? Then I can keep in mind who you are.

Mr. BABCOCK. My name is Stephen Babcock, sir. I am the Executive Director and Chief of Staff of the Administrative Conference of the United States.

Mr. SMITH. Mr. Chairman, my name is Loren Smith and I am Chairman of the Administrative Conference.

Mr. DANIELSON. Thank you.

Mr. BERG. Richard Berg, the General Counsel of the Conference.

Mr. DANIELSON. I have seen you before, sir.

Mr. BERG. A few times.

Mr. LUBBERS. Jeffrey Lubbers, and I am the Acting Research Director of the Administrative Conference.

Mr. DANIELSON. Fine and dandy, gentlemen.

We have you here, we welcome you. I have read your statement, but I would like to have you tell me more about it. There is no objection and your written statement will be received in the record. I would appreciate it if you would just go along, Mr. Smith, argue your case as to why you think you need money again as best you can.

TESTIMONY OF LOREN A. SMITH, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES; ACCOMPANIED BY STEPHEN L. BABCOCK, EXECUTIVE DIRECTOR AND CHIEF OF STAFF; RICHARD K. BERG, GENERAL COUNSEL; AND JEFFREY S. LUBBERS, ACTING RESEARCH DIRECTOR

Mr. SMITH. Mr. Chairman, thank you very much for the opportunity to come before your committee and testify in support of House

bill No. 4476, which would extend our existence and authorization for another 4 years.

I guess in this period of budget crunch it is particularly important that each agency justify its reason for being and its reason for existing.

In my past life I was a professor of constitutional law, and when the President nominated me for this position, some of my students asked me what the Administrative Conference was. I explained to them that under our Constitution there are three basic functions that are given to Government. One is to provide for a national defense, two is to insure domestic tranquility and provide for a court system, and the third is to provide for an Administrative Conference of the United States.

Mr. DANIELSON. I think that's in the preamble, isn't it? [Laughter.]

Mr. SMITH. I think that it is.

Mr. DANIELSON. I have not found it yet, but it must be in the preamble.

Mr. SMITH. I am sure it is. But they still wanted to know what the Conference did.

The Conference, as I think this committee knows better than any group, is a unique kind of entity in the Government. Hamilton in the Federalist papers talked about the courts as being a unique entity and being a very sensitive entity because they had neither the power of the sword nor the power of the purse. All they had was the power of judgment.

Well, the Conference, I guess, doesn't really have even that power of judgment. All the Conference has is the power of persuasion and credibility and the ability it has to give aid to the Congress and the President in carrying out their responsibilities.

I see the Administrative Conference as playing a vital and important role—"vital" maybe is too strong in a time when we're trying to compress budget priorities—but a most important role in helping that task. The Conference can provide a forum, a focus, a catalyst, for looking at Government programs, helping to evaluate how the Government works, making it more efficient, and providing the Congress a policy-neutral source of evaluation of programs and procedures. For these reasons, I really feel it is a very, very useful entity. I refer to it to friends and to students as a "gem", a unique place in the Government where we can evaluate programs, not in the normal policy atmosphere and not in a partisan atmosphere, but in the sense of professional, procedural clarity.

I would really see that as the development of the Administrative Conference, and if it is authorized for another four years, that tradition that it has developed along will be the tradition it will continue along.

The main changes I intend and will attempt to make in my tenure as chairman is to broaden the visibility of the Conference, to heighten its awareness among the various executive agencies, independent agencies, the congressional committees that use our services, and give more help in a period I think when we have to reappraise how efficiently Government functions.

Mr. Chairman, thank you. I don't want to go on. As a former professor and one used to and having a captive body of students, I

have this tendency to be able to go on forever. So I would rather stop and let you ask me anything you would like to.

[The statement of Mr. Smith follows:]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W. SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

OFFICE OF
THE CHAIRMAN

HEARING
BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

ON

H. R. 4476,

TO AMEND THE ADMINISTRATIVE CONFERENCE ACT, BY AUTHORIZING APPROPRIATIONS THEREFOR

February 10, 1982

STATEMENT OF LOREN A. SMITH
CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Accompanied by:

Stephen L. Babcock
Executive Director

Richard K. Berg
General Counsel

Jeffrey S. Lubbers
Acting Research Director

Summary of Testimony

The Administrative Conference supports enactment of H.R. 4476, which would extend the authorization of the Conference for four additional years, fiscal 1983 through fiscal 1986.

Our testimony reviews the accomplishments of the Conference during the period 1978-1981. These include adoption of 19 recommendations, three of which derive from our intensive study of FTC rulemaking under the Magnuson-Moss Act. We have also upgraded our implementation program, continued to advise Congress and the agencies on procedural aspects of pending legislation, and issued several useful publications, including a statistical report on proceedings before administrative law judges and a Directory of Administrative Hearing Facilities. A rulemaking manual is in preparation. At the direction of Congress, we have consulted actively with agencies on the development of regulations under the Equal Access to Justice Act, and as part of this consultation process, prepared and published model regulations to implement the Act. We believe our record over this period warrants a renewal of our authorization.

With respect to the terms of the authorization, we prefer "such sums as may be necessary to carry out the purposes of the Administrative Conference Act," because of the need for flexibility in budget authority in order to meet unanticipated demands, particularly responsibilities imposed by statutes.

92-841 O—82——2

Mr. Chairman and Members of the Subcommittee on Administrative Law and Governmental Relations:

I appreciate the opportunity to testify today in support of legislation to extend for four years the authorization of the Administrative Conference. I am particularly grateful to the committee for scheduling the hearing so early in the session.

This is, as you know, my first appearance before the committee since I assumed the Chairmanship of the Conference in July. I hope it will be the first of many. This committee and the Administrative Conference share a commitment to devising means for improving the day-to-day working of government, for making government fairer, more efficient, more accessible, and more responsive to the needs of our citizens. I know my predecessors have found you to be a strong source of support in connection with our legislative requests in previous years. The Conference and its staff have worked closely with this committee and its staff, particularly in the consideration of regulatory reform legislation in the last two Congresses. I am hopeful that cooperation will continue.

I am here today to urge prompt and favorable action on the bill before you. As you are aware, the Conference's present authorization extends only through the close of this fiscal year. This bill would authorize appropriations for fiscal years 1983 through 1986.

The Conference's present authorization was enacted in June, 1978, after oversight hearings in this committee and in the Senate Judiciary Committee in 1977. That legislation sought to provide for a substantially enhanced Conference program by gradually increasing the Conference's budget ceiling, which had been $950,000 in fiscal 1978, from $1,700,000 in fiscal 1979 to $2,300,000 for fiscal 1982. However, because of

Government-wide budgetary stringency and uncertainty about the role of the Conference under the various executive and legislative proposals for regulatory reform, the Conference has not been funded at the figures authorized in the 1978 legislation. Our budget for recent years has remained level at approximately $1.1 million.

Later in my testimony I will touch upon the question of what form we recommend that our authorization should take, but I wish to emphasize at this point that what we are seeking in this legislation is simply a renewal of our mandate at the effective level of activity contemplated by the 1978 Act. If such a mandate is enacted, we hope in the coming years to persuade the Administration and the appropriations committees that funding the Conference at such a level will be an investment that will repay itself many times over in fairer, more efficient, and more effective government.

Since this is our first general oversight hearing before this committee since 1977, I would like to review with you the Conference's activities over the past four years. I believe this record of accomplishment amply justifies a renewal of our authorization. But first, since some of you are new to this committee, just as I am new to the Conference, let me briefly describe what the Conference is, why it was set up, and what it is supposed to do.

Background and Structure of the Conference

The Administrative Conference of the United States is a Federal agency whose mission is to perform studies and to recommend improvements in the administrative procedures used by all Federal departments and agencies. The Conference was established in 1964 by the Administrative Conference Act, 5 U.S.C. §§ 571-576, and was activated in January, 1968 with the appointment of the first chairman. However, the

idea of the Conference was not new, and, indeed, the Conference was the successor to two very successful temporary Administrative Conferences, one established by President Eisenhower in 1953, the other by President Kennedy in 1961. Other temporary bodies in earlier years had also been established to examine the Federal administrative process, including the Attorney General's Committee in the 1930's and the two Hoover Commissions. A common feature of the recommendations of these temporary bodies was the call for the establishment of a permanent Federal organization to examine on a continuing basis the administrative procedures of Federal agencies and to recommend improvements. The present Conference was created to fill this need.

The structure of the Conference is unique among Federal agenices and reflects the purpose of bringing together knowledgable persons from within and outside of the Government for the cooperative study of common problems and the development of a consensus on proposals for improvements.

The Conference is headed by a Chairman, appointed by the President for a five-year term with the advice and consent of the Senate. He is the only member of the Conference who is a full-time Conference employee. The Chairman is assisted by a Council, which operates as something of a board of directors of the Conference. The Council has eleven members, the Chairman himself, plus ten members appointed by the President, at least five of whom must be from outside the Federal Government. Traditionally, the Council has been made up of five government and five public members, although on occasion the ratio of public to government members has been higher. The Council meets upon call of the Chairman, sets the agenda of the plenary sessions of the Conference, passes on the Conference's budgetary proposals, makes recommendations to the Assembly of the Conference with respect to the disposition of the matters before it, and advises the Chairman with respect to questions arising in the administration of the

Conference. Council members are appointed for three-year terms, but a Council member who enters or leaves the Government automatically leaves the Council, so that the desired ratio of public to government members may be preserved.

The membership of the Conference constitutes the Assembly of the Conference. In addition to the Chairman and the other Council members, it consists of 45 members designated by those Federal agencies entitled to representation on the Conference and 35 public members appointed by the Chairman with the approval of the Council for two-year terms. (Under the statutory formula, the ratio of Government to public members may vary somewhat; I am describing the present makeup of the Conference.) The Assembly meets at least once and usually twice a year in plenary session to adopt recommendations and to consider other matters of Conference business. Between plenary sessions, the members serve on the Conference's nine standing committees, which work to develop Conference recommendations and other items for presentation to the Assembly.

In the day-to-day administration of the Conference, the Chairman is assisted by a small, but very able, professional and clerical staff. In addition, our research projects are usually conducted by law professors under contract with the Conference.

Activities of the Conference

The chief products of the Conference are, of course, its recommendations and research reports. In its 13-year existence the Assembly of the Conference has met in plenary session 22 times and adopted 86 recommendations and six other formal statements. Our recommendations have ranged over the entire field of Federal administrative procedure. Some are addressed to problems common to many agencies, such as Recommendation 71-4, Minimum Procedures for Agencies Administering

Discretionary Grant Programs, and Recommendation 73-1, Adverse Agency Publicity. Some are specific to a single agency or program, such as the series of recommendations directed to the Internal Revenue Service's procedures in dealing with individual taxpayers, Recommendations 75-5 through 75-10. While most recommendations are addressed to one or more agencies, some call for legislative action, such as Recommendations 68-7, 69-1, and 70-1, which called for the abolition of sovereign immunity and certain other technical defenses to suits for judicial review of agency action. (These recommendations were fully implemented by Public Law No. 94-574, which was reported out of this committee and enacted in 1976.) A few recommendations are addressed expressly or impliedly to the courts, such as Recommendation 74-4, Preenforcement Judicial Review of Rules of General Applicability, and Recommendation 77-3, Ex parte Communications in Informal Rulemaking Proceedings. Nearly every recommendation is supported by a detailed research report prepared by a Conference consultant or by Conference staff. (These reports are frequently cited favorably in leading judicial opinions, and I think it fair to say that the Conference has sponsored a substantial portion of the significant legal research done in administrative law in the last thirteen years.)

In addition to developing recommendations, the Conference is active in seeking their implementation. This is primarily the responsibility of the staff of the Chairman's Office. Recommendations, upon adoption, are published in the Federal Register and forwarded to the affected agencies with a request for a report on the extent to which they are being implemented. Where legislation is called for, the recommendations are sent to the appropriate Congressional committees. I must emphasize that the Conference has no authority to compel an agency to adopt its recommendations. Implementation must be achieved through persuasion and constant reminder. Because of the large number of recommendations, many of which are addressed to several agencies,

even to obtain adequate information on the state of implementation has been a major challenge. In response to suggestions from OMB and GAO, we have in recent years been devoting greater attention to implementation, but to conduct a fully satisfactory program of evaluating implementation experience has thus far been beyond our resources.

Apart from the development and follow up on recommendations, the Conference collects and publishes information and studies on subjects relating to Federal agency procedure. Our staff consults with Congressional and agency staff on procedural problems in pending legislation; we file comments with Congress and OMB and sometimes testify on such legislation; and, to an increasing extent, we have been given special assignments, generally of a consultative nature, by Congress in new legislation.

Achievements in the Period 1978-1981

This has been a rough overview of the main areas of Conference activity. I would like now to expand upon this description with particular reference to developments since the last oversight hearings, that is to say, in fiscal years 1978-1981.

During the period 1978-1981 the Assembly of the Conference met in plenary session seven times and adopted 19 recommendations and one statement. Three of the recommendations were the product of the Conference's comprehensive study of Federal Trade Commission rulemaking under the Magnuson-Moss Act, Pub. L. No. 93-637. This study, which was directed by Congress in the Act itself, was completed in June, 1980. This was the largest research project ever undertaken by the Conference and involved the collection and analysis of data from all twenty rulemakings initiated by the Federal

Trade Commission from January, 1976, to December, 1978. The primary part of the Conference consultant's report, totalling over eight hundred pages (excluding appendices), assessed the operation of the Act's "hybrid" rulemaking procedures during the prehearing, hearing, and post-hearing stages of the FTC's elaborate rulemaking process. The consultant also submitted a separate two-hundred-page report evaluating the operation and effects of the Magnuson-Moss Act's novel program for compensating participants in FTC rulemakings. On the basis of the consultant's report and careful consideration by the Conference's Committee on Rulemaking, the Conference adopted three detailed recommendations. The first, Recommendation 79-1, addressed the hybrid rulemaking procedures employed by the FTC under Magnuson-Moss, concentrating on the stages of the proceeding up to and including the hearing. Recommendation 79-5 dealt with the FTC's administration of its program for reimbursement of participants' expenses. Recommendation 80-1 covered the post-hearing stages of the rulemaking process, but also included more general recommendations regarding the procedural requirements of the Act. In particular, the Conference concluded that the hybrid rulemaking procedures required by Magnuson-Moss had not proved effective as a means of controlling agency discretion in its exercise of a broad delegation of legislative power. In other words, we concluded that more complex procedures are no substitute for clearer policy direction. Indeed, our study showed that where substantive direction from Congress is lacking, the kind of procedural requirements found in the Magnuson-Moss Act can become counterproductive. To quote from the preamble to Recommendation 80-1:

> "The Magnuson-Moss Act procedures can only be effective when the substantive decision-making process is structured, as in adjudication, by fairly detailed legal or technical standards which establish the boundaries on the inquiry and inform the participants what kinds of information are relevant and probative. . . . This type of structure was lacking in trade regulation rulemaking by the FTC. . . ."

I think our study and conclusions are highly relevant to the Congress' deliberations on regulatory reform legislation.

Among the other significant subjects addressed in Conference recommendations adopted since 1978 are agency use of private standard-setting organizations in the development of health and safety regulations (Rec. 78-4); agency procedures for the assessment and mitigation of civil penalties (Rec. 79-3); and procedures for the enforcement of petroleum price regulations (Rec. 80-2). We estimate, on the basis of the caseload pendng when this last recommendation was adopted, that implementation of our proposal would have saved the Government and private litigants in excess of $60 million, and even though many cases have since been settled or otherwise disposed of, we believe that implementation would result in significant savings in the disposition of the remaining cases. I might also mention our Recommendation 80-5, entitled, Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action. This recommendation calls for use of a system of random selection as a means of eliminating the wasteful and discreditable practice in which adverse parties race to favored courts to file appeals from agency rulings. We are pleased that the Conference's legislative proposal on this point has been included by this committee in its pending regulatory reform bill, H.R. 746. Here again, although we have no way to develop a precise estimate, the adoption of this recommendation clearly will result in the savings of many millions of dollars.

—

Last December the Conference held its Twenty-third Plenary Session. At that session the Assembly adopted two recommendations. Recommendation 81-1 is addressed to the agency procedures for assessing and collecting fees for complying with requests under the Freedom of Information Act. Its principal proposal is for an amendment to the Act to permit charges for the cost to the agency of routine review of records to determine

whether an exemption should be asserted and the cost of deleting exempt information. At present, agencies are permitted to charge merely for search time and for duplication costs. We do not propose any change in the present provisions for waiving or reducing fees where the agency detemines that there is a public benefit in furnishing the information. Our recommendation also calls for the Department of Justice to promulgate guidelines for agency fee schedules and practices in the interest of promoting uniformity on this subject wherever practical.

The second recommendation adopted in December was Recommendation 81-2: Current Versions of the Bumpers Amendment. You may recall that in December, 1979, the Conference adopted a recommendation opposing the then current version of the Bumpers Amendment. However, as you know, the Bumpers proposal was subsequently revised very considerably, and, indeed, as of December, was pending in three different versions. We thought it desirable, therefore, to update our 1979 position so as to address the current versions. Recommendation 81-2 reiterates the Conference's opposition to any across-the-board legislation to alter the weight which reviewing courts afford to agency statutory interpretations or expertise. However, it does endorse that part of the amendment to 5 U.S.C. § 706, contained in H.R. 746, which adds a subsection (d), requiring a court reviewing an agency rule under the "arbitrary and capricious" standard to consider whether there is "substantial support in the rulemaking file" for the factual basis of the rule. We feel this is a useful clarification and consistent with recent case law.

Another important area of recent activity has been our effort to to heighten agencies' and Congress' awareness of the recommendations developed by the Conference. In the past, Conference recommendations, which after all, represent the best thinking of some of the ablest minds in the country on important problems of administrative procedure,

were sometimes neglected because we did not undertake a sustained, systematic effort to demonstrate their value to the affected agencies and the Congress. Though Chairmen since the Conference's inception have recognized the need for greater attention to securing compliance, until recently implementation efforts were sporadic and received a low priority in the assignment of staff time.

We have redirected the staff's activities in this area. In 1978, for the first time, we employed an experienced staff attorney whose primary duties include working to implement our recommendations and coordinating other staff attorneys' work in this area. We then identified about a dozen Conference recommendations most likely to benefit from added implementation work, and assigned each of our staff attorneys primary responsibility for evaluating and encouraging compliance with one or more. This approach permits each attorney to concentrate on and develop expertise in one or two major areas. Among the recommendations targeted for priority treatment are those dealing with civil money penalties assessment procedures, procedures for administering grant programs, time limits on agency action, and agency rulemaking procedures.

Our upgraded effort to encourage implementation of Conference recommendations involves keeping track of legislative developments, agency rulemakings, and other activities to which our recommendations may pertain, preparing model rules, draft statutes and legislative materials, commenting or testifying on proposed agency rules, circulars and policy guidelines, developing implementation strategies for priority areas, engaging consultants and members in our efforts at persuasion, and arranging meetings to discuss recommendations with agencies and the Congress.

In 1977 we completed an intensive study on the extent to which over 60 Conference recommendations had been carried out. The report, preparation of which required an

extraordinary effort by virtually all of our staff, made it clear that, even before our new implementation program, most of our recommendations had achieved full or partial implementation. We believe that by taking a more active role in advising and persuading agencies, the Conference can gain still greater visibility as a constructive, thoughtful contributor in the field of administrative reform.

The Conference has continued to devote significant attention to advice and consultation with Congress and the agencies on legislation. For example, in the 96th Congress repesentatives of the Chairman's Office testified nine times before Congressional committees considering procedural problems in existing or pending legislation. In addition, numerous written comments, formal and informal, were transmitted to Congress and to OMB and the agencies. Much of this activity was generated by the various regulatory reform proposals which, as this Committee is well aware, have occupied the attention of the last three Congresses.

Our legislative activity is, of course, an aspect of our implementation program, since it is our aim to bring to the attention of those involved in preparing legislation any relevant Conference recommendations and other statements of position. However, since our staff has experience and information with respect to a broad range of agency programs and administrative law generally, we do not restrict our advice to those subjects on which the Assembly of the Conference has spoken, but attempt to provide whatever advice and assistance we can, while distinguishing between the positions which are based on Assembly action and those which are merely the views of the Chairman's Office.

The Administrative Conference Act authorizes the Conference to "arrange for interchange among administrative agencies of information potentially useful in improving

administrative procedure," and to "collect information and statistics * * * and publish such reports as it considers useful" for improving administrative procedure. Thus, we have an informational function which is apart from the development and implementation of particular recommendations.

With respect to informational activities, we can point to a number of recent achievements. In 1975 we developed our Uniform Caseload Accounting System to collect caseload and individual case data from almost 30 agencies which use administrative law judges to preside over formal proceedings. The first report, covering fiscal 1975 was published in October, 1977. In July 1980 we published a report covering fiscal 1976-1978. This volume, nearly 400 pages in length, contains not only caseload data for each agency and type of proceeding but information for each type of case as to the manner of disposition, the average elapsed time at each stage, and the amount of paperwork generated. This mine of information has been useful to our consultants and others interested in a broad overview of the administrative law judge hearing process and those interested in searching out the causes of delay in such adjudication. For example, one finding is that in many agencies the greatest delay occurs in the stage of agency review of the ALJ's decision. We hope to analyze these statistics more closely in the coming year.

Another publication we sponsored is a consultant's report entitled, Federal Reorganization: What Have We Learned? It consists of a series of chapters by participants in reorganization efforts in the last fifteen years, analyzing the prospects and difficulties of reorganizations, and developing some rules of thumb for agency officials. This book was distributed to many executive branch and Congressional officials with an interest in reorganization. I think it will be a valuable resource to every new administration that has an eye on reorganization—and most do.

To help agencies with the often difficult task of finding suitable locations for administrative hearings outside Washington, the Conference in 1981 published a Directory of Administrative Hearing Facilities. The collection of this information stemmed from our efforts to secure implementation of the Conference's very first recommendation, which called on GSA to provide more adequate hearing sites in many cities and to publicize their availability. The Directory, which we compiled from data provided by dozens of agency offices, lists, describes in detail, and gives contacts for available hearing sites in hundreds of cities across the country. It is intended to help administrative law judges, boards of contract appeals, agency review boards, and other persons who schedule agency hearings to locate suitable facilities quickly and efficiently. The enthusiastic response we have received from those who now are using the Directory attests to its usefulness and confirms the correctness of our initial belief that, by sharing information, all agencies can gain access to more (and better) hearing sites than any one of them could do on its own.

Finally, I should note two works in progress. We have just submitted to GPO an update of Judge Merritt Ruhlen's Manual for Administrative Law Judges. This handbook was first published in 1974 and has been very well received not only by the Federal administrative law bar, but also by hearing officials and others involved in state admninistrative proceedings. In addition, our staff is engaged in preparing a rulemaking manual, which would be a sort of handbook for agency rulemaking staffs. Despite the importance of rulemaking, no such handbook exists. The manual we are drafting to fill that void will be designed as a practical guide to all the procedural and legal requirements of rulemaking. The many new laws, Executive Orders and court decisions pertaining to rulemaking make it a complicated undertaking. We hope that our book will help agency lawyers and technical experts, as well as the interested public, understand this important element of government. We expect to complete it this year.

A significant new area of responsibility for the Conference, and one in which we will continue to be active, is the implementation of the Equal Access to Justice Act, P.L. 96-481. The Act provides for the award of attorneys fees and other expenses to parties meeting certain eligibility standards who prevail over the United States in civil court cases other than tort claims and in adversary adjudications before Federal agencies. The Act assigns two major responsibilities to the Chairman of the Administrative Conference: (1) to act as a consultant to agencies in the establishment of uniform procedures for the consideration of applications for fees and expenses in their own administrative proceedings; and (2) to prepare annual reports to Congress on the amount, scope, and impact of awards and fees made by the agencies in administrative proceedings under the Act.

We determined that an efficient way to accomplish the first task would be to develop model regulations for implementation of the Act, to serve as a guideline for agencies in adopting their own rules. We first organized a task force of interested staff members from affected Federal agencies and interested Congressional staff to help us identify problems and to conduct basic research on legal issues raised by the Act. Based on the task force's efforts, we prepared and published draft model regulations in March, 1981 (46 F.R. 15895). We then revised the model regulations in response to comments received from agencies and members of the public, publishing final model regulations in June, 1981 (46 F.R. 32900).

These model rules promoted the statutory goal of uniformity and have undoubtedly saved individual agencies a great deal of time and effort. All of the agencies that have proposed or adopted regulations have incorporated substantial portions of the model, and almost all have followed it very closely.

Since publication of the model regulations, we have continued to exercise our consultative responsiblity by providing agencies with our views on their individual regulations. We have also provided informal assistance to numerous agency personnel

and to members of the public seeking advice about the Act or its implementation. Some agencies have not yet adopted regulations, and we will continue to provide assistance and consultation to these agencies as needed.

Our efforts toward fulfilling the Chairman's second responsibility under the Equal Access to Justice Act, the preparation of annual reports to Congress on agency implementation of the Act, have so far involved obtaining the information necessary to evaluate the agencies' performance and the Act's impact. We designed, cleared through GSA, and distributed to the agencies a data collection system for this purpose. This task was completed in October, 1981, when the Act went into effect. Two forms, a quarterly report form and an individual case report form, elicit information including the types of proceedings in which fee awards are sought, the reasons agencies grant or deny awards, the amount of awards actually made by agencies, the source of funds for paying awards, and the general impact of the Act on agency programs and budgets. Most agencies have begun submitting the reports, and we are now working with the remaining agencies to get their reporting systems established as soon as possible.

As we gather this data, we will be examining it for evidence of any significant trends in agency implementation of the Act. This will help us to prepare a thorough and incisive annual report on the Act's first year. In addition, we will be able to make the data available on an interim basis to members of Congress, agencies, or other persons interested in learning how the Act is working.

I think this record of achievement over the last four years demonstrates that the Conference is accomplishing the tasks for which it was created and that it deserves a renewal of its mandate. It is important to emphasize, moreover, that this record was achieved with substantially the same level of budgetary resources previously available to the Conference. As I stated earlier, the Conference has not received an increase in its budget commensurate with the authorization increases in the 1978 legislation. Whereas

our budget in FY 1978, the last year under our previous authorization, was $935,000, in the last four fiscal years it has hovered around $1.1 million.*

Our tight budget has, of course, forced us to defer the plans for staff expansion outlined in our 1977 presentation to your committee. Fortunately, we have been able to avoid "riffing" any employee; our permanent full-time staff is now at 18, the same figure as in FY 1978. (It is, I might add, an excellent staff, lean, though not mean, and they have been of tremendous assistance in smoothing the transition in leadership at the Conference.)

Over the past few years, the principal impact of budgetary restraint has been on our research program, since payroll and other fixed expenses are harder to control. We see a loosening of the restraint on research in our 1983 budget, which should permit an increase of approximately $175,000 over the research funds available in the current fiscal year.

Let me turn now to the provisions of the bill before you. H.R. 4476 would authorize appropriations for the Administrative Conference for fiscal years 1983 through 1986 in an amount not to exceed $3,000,000 for each fiscal year.

In the bill which we sent to Congress, we requested that in place of an authorization of a specified dollar amount, our authorization be "for such sums as may be necessary to carry out the purposes of" the Administrative Conference Act. When we proposed such language at our authorization hearing in 1977, we pointed out the difficulty of setting a realistic authorization level when we must retain flexibility to adjust our priorities and scale of activities in order to be able to address needs and problems as they emerge. In

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*/ FY 1979, $1,062,000; FY 1980 $1,119,000; FY 1981 $1,167,000; FY 1982 $1,051,000.

particular, we cited our experience with statutorily assigned functions, which have never been accompanied by the funding to carry them out.

Our forebodings in this regard were to some extent born out by our subsequent experience with the Equal Access to Justice Act. Enacted late in 1980, the Act, quite unexpectedly, assigned substantial consultative responsibilities to the staff of the Conference. These responsibilities we carried out and are continuing to carry out successfully, but, of course, it has been at the cost of diverting significant staff efforts from other activities. This is, I confess, an imperfect example of the problem I stated. Because our appropriation for fiscal 1981 was well below the authorization in our statute, we were in fact able to seek a supplemental appropriation, although we did not obtain it. But had our budget for that year been at or near the authorized level, we would not even have been able to seek the supplemental to carry out the Congressional assignment. Therefore, the point is still valid that a specific authorization level inhibits our ability to take on new responsibilities.

While I understand that a fixed authorization is a matter on which the committee has strong views, our experience has repeatedly shown the need for flexibility to allow the Conference to respond to demands unanticipated at the time the authorization is enacted. I therefore respectfully reiterate the Conference's request that it be authorized "such sums as may be necessary to carry out the purposes of the Administrative Conference Act."

I am grateful for the opportunity to testify today. I and my assistants will be glad to answer any questions you may have.

Mr. DANIELSON. I think that you only share that tendency when you're talking to people in political office, because it has often been said that it takes me 10 minutes to clear my throat. [Laughter.]

There must be some additional things here that you can point to which you feel would justify our authorizing a sum of additional funding for the Conference, if not all that we have in the bill. Either you or your associates could probably point out that information.

Why do you feel you need an increase of money over the previous authorizations?

Mr. SMITH. I think there are a number of important projects that the Conference can and should get into except for the fact that we have no money.

Just to give a couple of examples, the Vice President, in speaking at our recent plenary session in December, suggested that one of the pressing problems confronting the Federal Government was sorting out and clarifying and improving the efficiency of its relationships with the States.

The Conference, I think, can be a very effective tool. Most of the State-Federal programs have been looked at from the federalism aspect, and many are looked at from the questions of fraud or substantive questions. But no one has really looked comprehensively at the procedural aspects of Federal-State relations. I think there is a great deal of work that can be done in developing and improving those procedures. But again, that requires additional funds and may require us to request increased appropriations.

A second area——

Mr. DANIELSON. Can you give me an illustration or two of that? I am trying to figure out what would be the procedural relationships.

This committee, in addition to administrative law, also does have jurisdiction over intergovernmental relations, and we always assume that that includes the relationships between the States and the Federal Government, as well as inter—the States themselves.

Mr. SMITH. One of the things that strikes me, as one formerly involved in local government, is the diversity of Federal-State types of programs. This went all the way from the setting of standards, to percentage grants, to outright Federal regulations, to totally almost voluntary Federal grants which a State could apply for or not. It seems one of the problems that State and local officials are bringing to the attention of Government is they are being inundated with a plethora of regulatory rules and procedures that they don't understand and requires a lot of staff time on their part.

The problem, it seems to me, should be looked at as to whether some kind of model system, whatever that system may be, would be simpler, if we had an APA for the States, some statutory scheme which would regulate Federal-State relations. I don't know that that's a workable idea but I think it is the kind of thing that should be explored to bring some handle to this problem.

Mr. DANIELSON. I guess you would concede that State officials have some capacity to run their own government; we don't have to tell them necessarily from here how to function, I don't believe; do we?

Mr. SMITH. Oh, no. I fully agree. The problem would be one that I think the State government should partcipate in and a solution

may be far from mandatory. But I think the problem is one that the Conference can provide a useful forum for.

Mr. DANIELSON. That would be a pretty good research project, then, I guess, if your research chiefs ever get to work on that. Is that the idea?

Mr. SMITH. I would hope so. They have been pretty efficient in getting to work on other projects we have had.

Mr. DANIELSON. Now, you were about to launch into a second subject.

Mr. SMITH. The second topic we are interested in is the area of immigration policy. Currently, immigration policy is established by really four separate Cabinet departments with four very different goals and philosophies behind the departments. You have the law enforcement aspects of the Immigration Department residing in the Department of Justice, the Immigration and Naturalization Service; you have the human welfare aspects given to the Department of Health and Human Services; you have the foreign policy implications handled by the State Department; and you have some of the domestic economic considerations handled by the Department of Labor.

I served as the Transitions Representative on the Select Commission on Immigration and Refugee Policy, and again——

Mr. DANIELSON. Let me say one thing. You sure messed that up. [Laughter.]

Mr. SMITH. I just sat there and listened. [Laughter.]

One of the things in sitting with that group, I felt the Conference could provide some useful administrative and procedural expertise, that that aspect of the problem hadn't been explored fully, and that a research project in that respect I think would be very useful.

Mr. DANIELSON. OK, that's your second point.

Do you have another one there?

Mr. SMITH. Well, I think we have several more. The administrative court has been a procedure that has been discussed for a number of years and I think the Conference could benefit the Government by doing a study of that particular issue.

The fourth area is really the question of the Inspector General system. It has now been in place for several years and, like any system, a good empirical review is necessary. Empirical reviews, of course, are one thing currently the Conference has been very reluctant to do because they can financially get out of hand and it may take a lot more than you can estimate initially to do an adequate empirical study, as we found out in our study of the FTC.

A fifth one——

Mr. DANIELSON. Wait a minute. I had the administrative court as number three. Maybe I skipped one.

Mr. SMITH. I'm sorry. I went over it and went to the question of the Inspector General system and a comprehensive review of how the system is now operating after several years and what improvements can be made in that system. Of course, that is an empirical study, and on empirical studies we have always been somewhat more concerned about because they can drain our resources a lot more rapidly.

Mr. DANIELSON. Then what would be five?

Mr. SMITH. The fifth procedure is the question of the Sunshine Act. Again, the Sunshine Act is within the purview of the Conference's authority and we drafted an interpretive guide to the Sunshine Act when the act was first passed. I think at this point we have a study that is beginning to evaluate the effects of the Sunshine Act. I think that empirical study may need considerably more funding than we initially have committed to that project.

Mr. DANIELSON. Do you have any other salient points you would like to give us?

Mr. SMITH. Mr. Chairman, I will defer to my Research Director. We have a whole list of them that we have discussed, things that we think are relevant to the question.

Mr. DANIELSON. We would be delighted to hear from him. You're Mr. Lubbers, right?

Mr. LUBBERS. Yes, sir.

We can provide you with some more written material on this after the hearing, if you would like. We have a number of other topics we have developed over the years along with those matters we already have in our pipeline which we can talk about, too, if you would like.

Some of the other topics we have discussed involve things like agency versus Department of Justice control of litigation in the courts, how that system has worked out. Some agencies have their own attorneys handling matters in the Federal courts, while most agencies use Department of Justice attorneys to do that. There is some tension in that——

Mr. DANIELSON. What are you doing with respect to that subject matter?

Mr. LUBBERS. These are proposed topics.

Mr. DANIELSON. Oh, this is a proposed topic?

Mr. LUBBERS. That is another proposed topic. I would be happy to talk about matters in our pipeline.

Mr. DANIELSON. No, go ahead. Give me another proposal while you're at it.

Mr. LUBBERS. Yes, sir. Another one has to do with administrative inspection procedures that are used by the various health and safety agencies, like OSHA, EPA and other agencies, where there have been some court cases that require warrants before agency officials go in and inspect factories and so forth. There is some question about how far that warrant requirement extends.

There is a problem with respect to the use of consultants to do inspections. There is a split in the circuits on that point. EPA has hired consultants to go in and look at factories and so forth. That's another possibility.

This is a somewhat smaller scale topic, but the use of teleconferencing in agencies hearings, that is something that very few agencies do. It seems like a fairly easy way to make hearings cheaper for far-flung participants.

Mr. DANIELSON. How do you perceive the teleconference? I don't care about the technical aspects, the wattage and voltage and how many transistors and so forth, but what would the final presentation look like? What would it be?

Mr. LUBBERS. Well, I am not that expert on the technology, either, but I presume that instead of having a party, say, attend a

social security hearing from a long distance, they would be able to appear on video, on a screen.

Mr. DANIELSON. Something comparable to a television screen?

Mr. LUBBERS. Yes.

Mr. DANIELSON. Or what we used to talk about years ago, you know, on a telephone you can see the person you're talking to, et cetera.

Mr. LUBBERS. That's right.

Mr. DANIELSON. OK. I get the point.

Mr. LUBBERS. Would you like me to go on with some others?

Mr. DANIELSON. Surely, please.

Mr. LUBBERS. Another topic has to do with the integration of these regulatory analyses that are now being required by the Executive order and may be required by the regulatory reform bill——

Mr. DANIELSON. Integration? I don't follow you. What do you mean by "integration"?

Mr. LUBBERS. How the regulatory analysis is being integrated into the rulemaking process; is it being used to actually improve the rule or is it being used as a post hoc rationalization for what the agency has already come up with.

Another aspect of this is that economists would be the ones working on these regulatory analyses by and large, and they would have to interact with the agency lawyers and people who are drafting the rule. It is essentially bringing a whole new shop or expertise into the rulemaking process——

Mr. DANIELSON. This, again, is a proposed subject?

Mr. LUBBERS. These are all proposed topics to be discussed.

I will just mention one other one which has to do with procedural implications of deregulation. Some of the agencies, as you know, like the CAB and the ICC, have been undergoing deregulation. There is some experience that we can now evaluate as to how this sort of deregulation should proceed in other agencies.

For instance, at the CAB, perhaps the lead time was too long. Perhaps there were too many stages set forth in the legislation for deregulation. Perhaps there wasn't enough attention paid to the needs of small communities. These are possible items we could——

Mr. DANIELSON. Do you have any other principal proposed subjects?

Mr. LUBBERS. No, that about covers our list.

Mr. DANIELSON. How about the ones that are, as you say, in the pipeline?

Mr. LUBBERS. Yes, sir. Again, I could provide you with a list of these, too.

Mr. DANIELSON. We would probably like that, but meanwhile, just skim over them and give me the highlights, please.

Mr. LUBBERS. Some of the major projects that we have that are closest to being ready for possible recommendations in the next plenary session or two include a study of Federal agency grant dispute resolution procedures——

Mr. DANIELSON. You had better spell that out a little bit.

Mr. LUBBERS. Yes, sir. Many agencies dispense grants to States and localities and private entities, and disputes arise between the grantee and granting agency or between third-party beneficiaries

and the grantee. Lots of disputes arise. Right now there is no APA for grant disputes. These matters are handled pretty much outside the Administrative Procedure Act.

The agencies develop very diverse methods of handling these disputes. The Department of HHS, for example, has a departmental grant appeals board which is fairly well structured to handle these things. Other agencies do it on an ad hoc basis. There are due process questions involved and, depending on the type of dispute at issue, you might want to provide more rights to the——

Mr. DANIELSON. Would you be good enough to give us an illustrative example? I was not aware of this as a problem.

Mr. LUBBERS. Well, let's see. I guess, if the Department of HHS issues a grant to a State and it provides for spending of money for certain items only—there is usually an audit at the end of the year on how the State has spent the money—if the Federal auditor finds there has been some discrepancy in the spending, there will be an audit disallowance of the money. Then the question is, should there be some recoupment of that money, should there be some subtraction of next year's grant. At any rate, there should be some recompensing of the Government in that instance.

Mr. DANIELSON. And you say that is not covered by existing law, as far as you know?

Mr. LUBBERS. It may be covered by existing law, but the procedures for handling the dispute are not settled. The grantee should have some opportunity to come in and challenge the action of the Federal Government; so should a third party who is relying on the State, where the State, for example, fails to follow some Federal law relating to discrimination. There should be some forum for handling these disputes. At HHS there is a forum.

Mr. DANIELSON. You mean a forum or a procedure?

Mr. LUBBERS. A forum and a procedure. At other agencies——

Mr. DANIELSON. Do they have their own intraoffice agency to handle that?

Mr. LUBBERS. Yes.

Mr. DANIELSON. What do they call that?

Mr. LUBBERS. It is called the Departmental Grant Appeals Board, and they have officials who serve—I think three members of this Board serve essentially as judges in these disputes. The members have staffs that handle the cases that are before that Board.

Mr. DANIELSON. In other words, these disputes happen with some degree of frequency?

Mr. LUBBERS. That's right. At HHS they do. At other agencies they do, too, but there is no formalized or structured procedure to handle these disputes. So——

Mr. DANIELSON. At HHS is there enough work along that line so that this becomes a permanent activity or responsibility of the group?

Mr. LUBBERS. That's correct.

Mr. DANIELSON. To the exclusion of other work?

Mr. LUBBERS. For those people involved.

Mr. DANIELSON. That's what I mean, for this corps of people.

Mr. LUBBERS. That's right.

Mr. DANIELSON. And they are not covered by the APA insofar as you know?

Mr. LUBBERS. That's right.

Mr. DANIELSON. Is there any other law on the books that directs or covers their activity?

Mr. LUBBERS. No, there is no governmentwide procedural statute that affects these grant disputes.

Mr. DANIELSON. Are appeals ever taken from their rulings to the courts?

Mr. LUBBERS. Yes.

Mr. DANIELSON. Do they issue some kind of a report?

Mr. LUBBERS. They issue decisions similar to those in APA ajudications.

Mr. DANIELSON. I would like this—I'm going to ask some other questions later, but on this point, I don't want to forget it.

Would you be kind enough to fill us in on that? This may be an area where we may need to consider some changes in the Administrative Procedure Act.

Mr. LUBBERS. I would be very happy to.

Mr. DANIELSON. Fine. Go ahead, then. That's one item in your pipeline.

Mr. LUBBERS. Another item is something that was recommitted to our committees this past plenary session, which has to do with the Freedom of Information Act and the handling of confidential business information by agencies. That we expect to come up again in June after our committees reconsider it.

We have another study of Federal agency regulation of carcinogens. In this study our consultant has looked at the operation in this area of four agencies—the FDA, the CPSC, the EPA, and OSHA. He has tried to study in depth the way these agencies have regulated carcinogens and has come up with a set of proposed recommendations that one of our committees will be addressing in the next couple of weeks. These recommendations have to do with interagency coordination, the promulgation of generic guidelines for regulation in this area, such as the one OSHA has been wrestling with for the last couple of years.

Mr. DANIELSON. To what agency, to what part of the Congress would you report findings of that nature?

Mr. LUBBERS. I think this would be directed to the four agencies. I don't think it would involve proposed legislation.

Mr. DANIELSON. Then what would it involve?

Mr. LUBBERS. It would involve changes in approaches or procedural regulations used by the agencies.

Mr. DANIELSON. Of course, you would have no way of compelling that. It would just be suggestions.

Mr. LUBBERS. That's true. I would think the oversight bodies of Congress would be able to help in that regard.

Mr. DANIELSON. OK. Let's see, we've got the carcinogens and freedom of information, the agency grant disputes. Do you have another major item?

Mr. LUBBERS. We have another one that may be ready for June, and that is in the area of what is now called regulatory negotiation. Regulatory negotiation is a concept that has been developed in the last couple of years—and there are some bills introduced in the other body on this—which would attempt to stimulate negotiations between all affected parties in major rulemakings, sort of as a

precursor to the agency's rulemaking proceeding. The bill that Senator Roth has introduced would, in fact, have the Administrative Conference Act as a sort of neutral convener of a regulatory negotiation committee.

Say there is a new environmental rule that the EPA is required to promulgate in the next year. What would happen under this scheme would be that affected groups would petition the Administrative Conference to set up a regulatory negotiation committee and make sure that all the affected parties' interests would be involved. They would thrash out all the issues and at the end of the process, with the agency's involvement, would come up with a proposal that would then be the agency's notice of proposed rulemaking and would go out for comment in the usual course of business. But in this case most of the issues would have been thrashed out in advance.

There are some precedents for this. The national coal policy project is one where both environmentalists and industry groups got together and came up with some consensus recommendations to the regulatory agencies involved.

Mr. DANIELSON. What are you folks doing on that subject?

Mr. LUBBERS. We are just exploring all the analogous efforts involving mediation and other negotiations that have taken place and we are trying to evaluate the provisions of the Roth bill and just go over all the possible procedures that such a committee might have to go through: whether unanimity would be required; how the agency should be involved; how the representatives should be chosen—that sort of thing.

Mr. DANIELSON. The subject is not new to us. It has been advanced by a number of people. In fact, we spent a rather limited amount of time just acknowledging letters urging its consideration, we were aware the subject existed when we were working on the regulatory reform bill.

Representative Donald Pease of Ohio has a bill in, and I think we have some other bills on the subject. It's an interesting concept and it may have some real value, but we don't have enough information to do anything with it during this Congress.

Mr. LUBBERS. As a matter of fact, Senator Roth spoke at our plenary session on this subject and fielded questions from the members on it.

Mr. DANIELSON. You might try Congressman Pease some time and find that he has probably something more in tune with the House of Representatives.

Do you have any other major items in the pipeline?

Mr. LUBBERS. Mr. Berg suggested that I mention another one to you, since I know your committee is interested in it, and that has to do with Government officials' liability for actions taken in their official course of business.

We know that a lot of former and current Government officials are plagued with suits brought by——

Mr. DANIELSON. You're talking about the Federal Tort Claims Act?

Mr. LUBBERS. Well, it would involve, I think, an amendment to the Federal Tort Claims Act.

Mr. DANIELSON. I don't know how else you would do it. How else would you do it?

Mr. LUBBERS. I'm not sure. The concept that seems to be crystalizing as a consensus would be the so-called enterprise liability, whereby the Government itself would be liable for the acts of its officials. There may be some sort of disciplinary apparatus created to discipline the officials.

Mr. DANIELSON. What other subject do you have?

Mr. SMITH. Mr. Chairman, if I could just add one additional thing to that, I want to stress the poignancy of this project to me. When we began considering it, I called former Attorney General Levy to see if he would be willing to help us in this area. He indicated to me—he had been ill for quite some time, and he indicated he has been plagued by 10 suits that were still pending against him. This was as of about 3 months ago. His lawyer wouldn't let him get involved in any way.

It is sort of sad that a man who left office with everyone's approval, and a distinguished Attorney General, had this many suits pending this many years later.

Mr. DANIELSON. Yes. That is perhaps sort of an occupational hazard, I think, if you're in the Government.

Mr. Berg, what do you have to offer that hasn't been offered?

Mr. BERG. Of course, I work a different beat at the conference. I am responsible for legal advice, particularly legislative. We are, as you know, continually active and attempt to be helpful, with Congress and with the Office of Management and Budget, and with the agencies, advising on matters of administrative procedure.

We have essentially not a great deal of legal resources that we put to this. We have good relations with, I would say, two or three committees in each House of Congress and essentially get business from them. We are not known elsewhere and I haven't really sought business, so to speak, from the other committees because we can't handle it. We can't really keep up with the course of substantive legislation which might present procedural problems. We concentrate on across-the-board legislation like the regulatory reform legislation.

There is a lot more that we should be doing in this area, that we could and should be doing, in terms of bringing the experience of the Conference and the collective wisdom, if you will, embodied in our 80-some-odd recommendations to bear as these problems arise in the course of legislation. It is a lot easier to fix a bad procedural provision while it is still in Congress or, indeed, while it is on the drafting board in an agency or OMB, than to try to live with it for a while and then try to get the legislation amended. As I say, I think there is a great deal more that we could do if we had some more people to handle it.

There is a project that we now have underway that I think is illustrative of the sort of thing that we are doing and that we would like to do more of. Most of the professional staff of the Conference is involved in putting together a rulemaking manual. This is not a highly academic, abstruse sort of analysis. It is as the title indicates, intended to be a handbook for agency personnel on the steps to go through in rulemaking, the various pitfalls that are present, the current case law.

I think in a very considerable respect one of our problems here, of course, is that we're aiming at a moving target. Perhaps you are a better judge than we are as to the prospects of the pending legislation. But still, rulemaking goes on and the need is there. We would much rather come out with something that is helpful and can then be improved than just to sit back and wait for the dust to settle.

We do have something that has now gone to press. Several years ago we published a manual for administrative law judges. This was done essentially on contract by a retired administrative law judge and former member of the Conference, Merritt Ruhlen. That now has been updated. It is at the publisher and will be available in a matter of weeks or months, whatever GPO's timetable is.

Another item which I might address, although I was not personally involved in it, is the consultative function which the Conference performed under the Equal Access to Justice Act. This was not the first time, as you probably recall, we have been called upon to perform, by statute, a consultative role with the agencies. We did it under the Government in the Sunshine Act. I think it was successful. It led to publication of our Sunshine Guide.

Then in the Equal Access to Justice Act, which was passed late in 1980, we were given the role of consulting with the agencies on the rules that they were to adopt to implement that act.

I might say this came as something of a bolt from the blue. We had not been involved in the work on this legislation other than to comment in the ordinary course.

Mr. DANIELSON. Did you publish anything pursuant to that Equal Access to Justice activity?

Mr. BERG. I would defer to Steve on that.

Mr. DANIELSON. Surely, of course.

Mr. BABCOCK. Yes, sir. I happen to be the staff member of us present who was the most involved in that. We first established a governmentwide task force of interested staff people from all the agencies involved and held three or four meetings, to which we invited interested Hill staff. I must say I think they were somewhat surprised that we were willing to let them into what were essentially nonpublic sessions. But everything worked out very, very well.

We made research assignments on particular aspects of the legislative history to those members of the task force that had the time and the interest to research particular questions. There were numerous new terms used in this act which have the potential for an immense amount of ambiguity. I see your staff persons smiling. I think perhaps they are aware of some of the novel terms.

In any event, we then published a draft model rule and invited both agency comment and comment from members of the public. We received numerous comments. We allowed a 60-day comment period, as I recall, so that people would have the opportunity to become aware of the model rule. We sought to publicize it in trade journals and in the general press, with some limited success.

We then prepared a draft, based on the comments we received from agencies and the public, circulated that to agencies, and came out with a final model rule which was published last June. I have

copies of it here today if you or any of your staff people would be interested in it.

Mr. DANIELSON. Maybe you could lodge one with us. It will not be printed in the record but it will be a part of our file.

Mr. BABCOCK. Of course, sir.

Then we——

Mr. DANIELSON. Let me make an additional suggestion. I would suggest you send a couple of copies to Congressman Kastenmeier. I happen to be on his subcommittee and we did write the law a few years ago. I am sure he would be interested.

Mr. BABCOCK. Yes, sir. There was one staff person, who participated in this effort, from Congressman Kastenmeier's subcommittee, who was, I might say, very helpful to us.

Then we commented on each agency's rule as it came out in the Federal Register. What the statute said was the Chairman of the Administrative Conference shall consult with each agency. Again, we didn't have the power to tell them what they had to do; just to advise them. Each agency came out with its own rules, most of which followed our model almost exactly. There were always a few variations because of things peculiar to the agency that prevented complete uniformity.

I think that our work was fairly successful. We received many compliments from agencies, and the fact that most of them just took our work and ran with it, rather than trying to reinvent their own wheel, is also evidence that we must have done a pretty good job.

Now, we have two obligations under this act. Congress told us to be a consultant to the agencies on their rules, and also told us to report annually on awards made by agencies under that portion of the act that governs administrative proceedings. As you know, the act applies both to court cases and to administrative proceedings, and our responsibilities are solely on the administrative side.

We have set up a system of reports. We have gotten it approved by GSA. They do the intergovernmental reporting approval, as opposed to approval of reports from the public which OMB now does. Reports are coming in from almost all of the agencies. Our chairman sent a firm letter to a few agencies who still weren't reporting—about 3 weeks ago—and we are drafting up a nasty note to follow if we haven't heard from the remainder.

An interesting thing is that absolutely no awards have been made by agencies or against agencies for administrative proceedings under that act, even though it has been in effect since October 1. There have been a few court proceedings——

Mr. DANIELSON. Excuse me. October 1 of 1981?

Mr. BABCOCK. Yes, sir.

Mr. DANIELSON. So we have 5 months under it?

Mr. BABCOCK. Yes, sir.

There have been a few court proceedings, and we have been in contact with the Administrative Office of the United States courts who are keeping track and performing a similar reporting function for court proceedings. Most of them are tax cases. I would guess, as of this moment, not more than three or four awards have been made. I have positive knowledge of only two.

Mr. DANIELSON. Have all the agencies adopted a rule now that will enable them to process these claims?

Mr. BABCOCK. Yes, sir.

Mr. DANIELSON. And from your testimony, I would say some are the procedures which were developed by you under this plan that you have described to us, and some are basically that but with modifications to adapt the rule to the peculiarities of the agency?

Mr. BABCOCK. That's correct, sir.

Mr. DANIELSON. Do you feel that that effort to get some coordination—I'm really talking about the so-called Equal Access to Justice Act—do you feel it was a useful venture into this field?

Mr. BABCOCK. No question. The drafters of the act hoped to have uniformity amongst agencies to the extent practicable, so that the lawyers out in the various States wouldn't have to deal with different concepts every time they were dealing with a different agency. The uniform rules promote that end.

Also, you have approximately 30 agencies with regulations and with covered cases, and we on our staff did most of the basic work in cooperation with them. You have saved almost thirty-fold in terms of time and effort by civil servants with an exercise like this.

Mr. DANIELSON. We are interested because, obviously, we want to do anything we are able to do which will speed up, without wasting quality, the functioning of the Government. I have had enough contact with that particular act so that I had some interest.

Do you have any other item? You talked about the rulemaking manual, the manual for administrative law judges and the equal access to justice activity. Is there any other salient point you would like to mention as to the things you have been doing?

Mr. BABCOCK. Well, our prepared statement mentions a great number of the things that we have been doing in the past year, and we have brought copies, as you see this stack in front of you, of a large number of documents.

Mr. DANIELSON. What is that thick one?

Mr. BABCOCK. This is a copy of the reprints of the reports that were done by our consultants in the year 1979. We started turning out annual volumes and we have 1978, a somewhat thinner green set, 1979 here, and 1980 will be back from the Government Printing Office in a matter of a couple of weeks.

These are all our consultant reports on which our recommendations are based. Government lawyers and scholars find the reports useful for subjects other than what we made of it. The raw material itself is useful and we get lots of requests for these things.

Mr. DANIELSON. You couldn't have brought them up here for nothing, so I think I will request that you leave, just to be lodged with our file on this subject matter, one copy of each. Would that be adequate for our needs?

Did you have a suggestion, Miss Potts?

Miss POTTS. No.

Mr. BABCOCK. I would be pleased to comply with that request, Mr. Chairman.

Mr. DANIELSON. I think it is useful for us once in a while to be able, when somebody alludes to something and we wonder what in the world was that—you know, we don't want to fill up all of our shelf space, either.

Mr. BABCOCK. I understand.

Mr. DANIELSON. I want to get back to the nuts and bolts now of the authorization a little bit.

You have a chairman; you have 10 council members. How much permanent staff do you have? I know you have an executive director; I know you have a general counsel; and I know you have a director of research, because they are all seated before me here.

Mr. BABCOCK. Yes, sir. You see before you about 20 percent of the total staff of the agency. We have 18 full-time permanent persons on the payroll at the moment, one part-time permanent employee, our excellent librarian who works 18 hours a week but who is a permanent employee, and two part-time temporary employees, one who assists in xeroxing and filing work and another who is a library student who works for the librarian. So the total on board is 21. In terms of full-time equivalencies, it would be about 19½.

Mr. DANIELSON. That is exclusive, of course, of the chairman and the 10 council members; is that correct?

Mr. BABCOCK. That includes the chairman, because he is a full-time employee of the Government at the executive level. The council members are not paid by us. They don't even get per diem when they attend meetings, so we do not count them as employees.

Mr. DANIELSON. Do they get their expenses, I hope?

Mr. BABCOCK. No, sir. Well, those who are not Government employees get their travel expenses when they come to meetings. Those who are Government employees, their agencies pick up their taxi fares or whatever.

Mr. DANIELSON. I see. They are not compensated for their service; they are simply reimbursed for their expenses of coming and going?

Mr. BABCOCK. Those who are not Government employees are reimbursed. Those who are Government employees are not. Their own agency picks up the tab.

Mr. DANIELSON. OK.

What is your appropriation for the current fiscal year?

Mr. BABCOCK. For the current fiscal year, sir, we have a continuation resolution, annualized, of $1.051 million, we have——

Mr. DANIELSON. I think we authorized more than that.

Mr. BABCOCK. Yes, sir.

Mr. DANIELSON. But that's all you got.

Mr. BABCOCK. That's all we got. It was a bad year for everyone and, compared to some agencies, we didn't do so badly.

Mr. DANIELSON. The request I put in this bill at your request was $2.3 million, to go to $3 million?

Mr. BABCOCK. Yes, sir.

Mr. DANIELSON. It looks to me like—you talked about 18 permanent and a full-time equivalent of about 19 or 20 employees.

Mr. BABCOCK. Yes, sir.

Mr. DANIELSON. Your biggest item, no doubt, is salaries?

Mr. BABCOCK. Yes, sir, that is correct. About 65 percent goes for compensation, plus benefits.

Mr. DANIELSON. Is this number, the 18 plus 1 plus 2, how long have you had that large a staff?

Mr. BABCOCK. Oh, we're down, sir, because of budgetary——

Mr. DANIELSON. How long have you had this small a staff?

Mr. BABCOCK. Well, we lost one of our three SES persons last fall——

Mr. DANIELSON. SES, what's that?

Mr. BABCOCK. Senior Executive Service. Those are the top, the old super grades. We lost him last fall and we were not able to replace him from outside the agency, although we could promote and still not run afoul of the antideficiency act.

Mr. DANIELSON. You said you were not able to replace. Why?

Mr. BABCOCK. Because we don't have enough money.

Mr. DANIELSON. OK. But you were not barred by law or by executive fiat or something like that?

Mr. BABCOCK. No, sir. We are under our ceiling at the moment in terms of full-time equivalencies.

Also, this year we have zero research money. All the projects that Mr. Lubbers talked about—and I must say I think he mentioned only about 7 out of a total of 21 on that list of his that are pending—all these projects are funded with last year's money. In the President's new budget, we will be going back up in 1983 to $1,339,000.

Mr. DANIELSON. Is that included in this current budget?

Mr. BABCOCK. Yes, sir. So we are going back up in 1983 and will again be able to start new research projects, even though like many agencies, our other expenses are going up, too. For example, our rent took a huge jump during the current fiscal year.

Mr. DANIELSON. I think all you're doing is taking facts that we could take judicial notice of. Everybody's rent goes up.

Mr. BABCOCK. Yes, sir, it sure does.

Mr. DANIELSON. Everybody's electric bill goes up. So we really believe you on that. [Laughter.]

Mr. BABCOCK. One agency I was talking to yesterday, their rent went from $4.5 million in 1981 to $7.5 million in 1982.

Mr. DANIELSON. Well, I'm joking a little, but the fact of the matter is we are all aware that the cost of doing anything is going up and you don't have to stress the point. I appreciate your mentioning it but you needn't belabor the point because we're with you on that.

Let me also tell you this. There will be another hearing. I do want to move quickly on authorization, but there will be another hearing because there are many things that you have brought up today which I deliberately sort of prodded you into bringing up, and there are some things which we have not touched on that we do want to have before the committee. So we will have another hearing before terribly long. However, I intend to move rather quickly on your authorization so we can get that off of our back, and also give you the piece of mind of knowing you'll have a "meal ticket" for your agency next year, hopefully.

Mr. Chairman, you have been Chairman for how long?

Mr. SMITH. Since July 12, 1981. Eight months now.

Mr. DANIELSON. And you are appointed for a 5-year term?

Mr. SMITH. It's a 5-year term.

Mr. DANIELSON. Now, the last previous Chairman, who I assume left on July 12——

Mr. SMITH. That's correct, Reuben Robertson.

Mr. DANIELSON. How long was he Chairman?

Mr. SMITH. He was confirmed by the Senate, I think, the beginning of October 1980, so he was Chairman for approximately 7 months as well.

Mr. DANIELSON. That's not 5 years.

How about the one prior to him?

Mr. SMITH. That was Bob Anthony, and he served the full 5—I think he was the only Chairman who served the full 5-year term. He resigned, I believe, in November of 1979.

Mr. BERG. It was 5 years plus, because——

Mr. DANIELSON. We recall. I'm just trying to identify him. He was here before us from time to time.

What was the name of the gentleman from October 1980 until July 12, 1981?

Mr. SMITH. That was Reuben Robertson.

Mr. DANIELSON. Why did he leave?

Mr. SMITH. As I understand the decision he made, he had made an agreement with the Senate Judiciary Committee that if a new President was elected he would resign. He felt he should offer the new administration——

Mr. DANIELSON. And he did resign?

Mr. SMITH. He did resign.

Mr. DANIELSON. Now, you have 10 council members, and my recollection is that they have 3-year terms?

Mr. SMITH. Three-year terms.

Mr. DANIELSON. And they are not subject to Senate confirmation, is that true?

Mr. SMITH. That is correct.

Mr. DANIELSON. Are they staggered terms, or how are they put in?

Mr. SMITH. Under the law now, they are not staggered terms. They serve from the time they are appointed for 3 years. I believe if they are Government members and leave the Government, their term terminates; and if they are private members and enter Government, their term terminates.

Mr. DANIELSON. But except for that nuance, they serve what, then, 3 years?

Mr. SMITH. They serve 3 years from the date of appointment.

Mr. DANIELSON. I presume over time, due to resignations, deaths, or whatever, the terms automatically become staggered.

Mr. SMITH. They have to some degree. The current terms are not staggered. Eight terms will expire 3 years from, I guess, last November, and another two will expire 3 years from—I guess it was last week, where a week-and-a-half ago we had our last council meeting and swore in two council members who had been reappointed by the President.

Mr. DANIELSON. Have they all served out their full 3 years?

Mr. SMITH. No. There are a number of factors, of course, that cause council members to come in or out. I really don't have a figure, but I am sure that most of them did not serve the full 3 years.

Mr. DANIELSON. Perhaps we will request you to give us that data.

Mr. SMITH. Surely.

Mr. DANIELSON. I have not asked you to provide a pro forma accounting of what you expect to need in the next few years, and you have not brought one with you, I don't imagine. Maybe you have.

Mr. SMITH. I don't believe we have.

Mr. DANIELSON. I wish you would supply us with a document telling us how you have been expending your money this last year. Don't get down to the most minute detail, but hit the reasonable categories. And likewise, please give us a pro forma for next year, and if you can, for a little bit farther into the future. I know you're looking at a crystal ball when you do that, but it is kind of nice to look at one now and then and see where we are.

I note that you say this last year you received $1.05 million-some from the Appropriations Committee, and that you are anticipating the President has included you into a $1.3-odd?

Mr. BABCOCK. $1.339 million. So it is basically $1.4 million.

Mr. DANIELSON. OK. I'm just getting the round numbers here.

The bill we have before us would give you $2.7 million. I can't believe that in this time of austerity that you are going to bump your heads on that. In fact, I don't think you will anywhere down the line. But we would like to have these pro forma and last year's statements.

[The material supplied to the committee is as follows:]

ACUS BUDGET STATUS REPORT
JANUARY 31, 1982

	(1) Budget Authority	(2) Obligations to Date	PROJECTIONS (3) Estimated Additional	(4) End of Year Projection	(5) Balance (1)-(4)
. STAFF SALARIES (as of pay per. end. 1/23/82)	$				
a. Permanent	$ 627,000	$ 196,601	$439,542	$ 636,143	$ -9,143
b. Other than Permanent Temporary/part time	28,000	12,005	16,889	28,894	-894
Per diem consultants					
c. Benefits	59,000	19,004	43,579	62,583	-3,583
Totals	$ 714,000	227,610	500,010	727,620	-13,620
. COMMUNICATIONS, UTILITIES AND OTHER RENT	57,000	25,557	36,440	61,997	-4,997
. SLUC (Office rent, parking)	103,000	51,328	52,218	103,546	-546
. TRAVEL	40,000	8,085	23,569	31,654	+8,346
. PRINTING/PHOTOGRAPHY	36,000	5,718	35,650	41,368	-5,368
. ADMINISTRATIVE EQUIPMENT	7,000	254	ø	254	+6,746
. SUPPLIES, MATERIALS & EQUIPMENT	38,000	10,005	19,928	29,933	+8,067
. OTHER SERVICES:	56,000	30,122	23,258*	53,380	+2,620
Research Contracts					
Other Contracts		(30,122)	(23,258)*	(53,380)	
TOTALS	$ 1,051,000	$ 358,679	$ 691,073	$ 1,049,752	$ +1,248

EXPLANATION OF PROJECTIONS

.a. Permanent salaries: $24,419 avg.payroll x 18 pays (1/24-9/30/82) $ 439,542

b. Others: $1,318 avg. payroll x 2.5 pays ($3,295))
$877 x 15.5 pays (less Gregg on 3/1/82) = $13,594) 16,889

c. Benefits: Permanents - $439,542 x 9.3% = $40,877)
Others - $16,889 x 6% = 2,702) 43,579

After dropping GSA Finance and other services.

DATE PREPARED: 2/3/82 (NBS)

Mr. Kindness of Ohio, would you like to inquire about anything?

Mr. KINDNESS. Thank you, Mr. Chairman.

I apologize for not being here earlier, but we were examining an interesting question in another subcommittee relating to the Postal Service. I just got all tied up in that and couldn't break away.

Mr. DANIELSON. Everything to do with the Postal Service gets tied up. [Laughter.]

Mr. KINDNESS. I do apologize for not being here earlier.

There are several questions I would like to ask. One is, H.R. 4476 has a 5-year authorization period, and I'm not sure of its origin, Mr. Chairman. Perhaps I should address the question to anyone who can answer, as to why the 5-year period was selected for the reauthorization.

Mr. DANIELSON. I thought it was 4.

Mr. KINDNESS. Is it 4? OK.

Mr. BABCOCK. One of those years, Mr. Kindness, picks up from the old bill, so it is 4 new years, even though there are 5 years mentioned in the bill.

Mr. KINDNESS. I am concerned that we don't see, in an oversight way, the Administrative Conference people as often as we would like. I guess it has really been a while since we have had a session of this sort. So I am wondering, really, whether a shorter period of authorization is desirable, tending to force us to take a look more frequently at where the Conference is going, and trying to project reasonable figures for authorization levels is a concern that we apparently share.

I understand the Conference would like to have such sums authorization rather than specific dollar amounts, and I have a little difficulty justifying any figure, whether it is higher or lower than the preceding year, whatever it may be, as far out as 4 years at this point, especially with H.R. 746, the regulatory reform bill and its cousins on the other side of the Hill nearing the point of debate and consideration in those two bodies. That will reflect on the activities of the Administrative Conference, most assuredly, in these years ahead.

So after all that discourse, my question really is, What about a 2-year authorization? Does that give anyone troubles?

Mr. SMITH. I would like our General Counsel to comment.

Mr. BERG. With respect to the mathematics, we deliberately chose an even number year period for what seemed to us a very practical reason, which is the way the cycle works, we ordinarily have a bill introduced in one session and the Congress doesn't finish its work on it until the next. We are, realistically, not a high-priority item for the Congress as a whole, and we have found in the past that our authorization is sort of racing the adjournment date to complete action.

For that reason, we chose a period which would enable us to have the bill introduced in one session and disposed of in the second session of the same Congress. That is the reason for the choice of an even number.

As between 2 and 4, obviously we would like a longer lifespan and feel, in terms of committee oversight of our activities, we would be glad to come up at any time and talk about what we have been doing.

I think, realistically, you must make your own judgment as to how often you want to take a look at us. We would prefer 4. If in your wisdom you decide on 2, we can work with 2.

Mr. KINDNESS. We would just see you more frequently.

Mr. BERG. Yes.

Mr. SMITH. That part I think is important. Unlike I guess most other agencies, we don't have really any line functions. Our whole strength of our program rests with the acceptance of our ideas and the benefit we can provide the Members of Congress and the committees of Congress and the people in the executive branch, so the more contact, the more we really get to function and the more effective we can be.

Mr. KINDNESS. Turning to another subject, it is noted in your testimony that the hybrid rulemaking procedures in the Magnuson-Moss Act fail to achieve their stated goal of clear policy direction.

Do you have any observations about whether the hybrid rulemaking procedures are being utilized well, or frustrated perhaps by agency personnel who would prefer not to have them, or is there another reason behind that? Certainly, it is possible that if agency personnel are not friendly to the hybrid rulemaking procedures they could pretty well frustrate their purpose.

But is there any further elaboration that might be helpful to us since we do have hybrid rulemaking of a sort proposed in H.R. 746? Are we aiming toward a useless function?

Mr. BERG. I think the lesson to be drawn from our FTC study and recommendations is not so much that hybrid is good or bad in the abstract, but that it has its limitations and one should recognize what it is there for.

In the FTC situation, this was one where Congress gave or confirmed in the Federal Trade Commission an extremely broad rulemaking mandate, with very little substantive guidance. Congress then created a rulemaking procedure which was exceedingly complicated, which was not quite what we call formal rulemaking, formal on-the-record rulemaking, but which was pretty close and which seemed to contemplate extensive factfinding, extensive adversary process.

One had the impression, one could infer, that Congress intention was to substitute procedures for directions. Our conclusion was that that did not work, that the two were not commensurate. Indeed, the two, in a way, worked against each other, because the more discretion that an agency has, with respect to where it goes with its rules, the more possible issues can arise in the rulemaking proceeding. And if you add onto that a procedural framework which encourages if it does not compel intensive exploration of issues, factual, legal and policy, then your rulemaking expands beyond the control of the human mind to encompass.

One of the problems with at least the early FTC rulemakings, they were developing this fantastic rulemaking record that no single factfinder and no small group could ever get on top of. Even the filing system was becoming a problem, and the filing system, after all, is merely a means to an end.

So we were not saying in our recommendation that hybrid rulemaking is bad, but we were asking Congress to recognize that it is not a substitute for direction; it is not going to narrow the agency's

discretion. We have obviously not studied in detail all the hybrid procedures and all the agencies that follow them. Of course, they vary very much. In a famous opinion, Judge Friendly said something to the effect that "it seems as if Congress has deliberately chosen not to use the same language in any two statutes."

But from what we have seen, our judgment is that hybrid works best, just as trial type procedures work best, where the issues are fairly narrow. It is sort of the difference between intensive cultivation and extensive cultivation. Where you are dealing with a fairly small range of issues, a fairly small range of factual disputes, you can resolve them in a highly structured, highly formalized proceeding. When you are all over the lot dealing with cosmic issues, it is exceedingly difficult to use formalized or semiformal or hybrid procedures.

Mr. KINDNESS. Do you think hybrid procedures do allow for the development of alternatives to the agency's proposed rule or practice?

Mr. BERG. Certainly, yes. Even if the agency is not commanded to set out a range of alternatives, presumably the interested parties will raise them. Much of the emphasis on considering alternatives, of course, is a direction to the agencies to think, and this has its purposes.

Mr. KINDNESS. I guess my only other question is, Where is Reuben Robertson now?

Mr. SMITH. He's in private practice with a firm in the District of Columbia. He stopped over at the office recently to see how we were doing.

Mr. KINDNESS. I had never really gotten acquainted with him. I knew his father and grandfather. But I'll have to look him up one of these days.

Thank you.

Mr. DANIELSON. Thank you, Mr. Kindness.

Mr. Glickman, would you like to inquire?

Mr. GLICKMAN. Mr. Chairman, I feel as if I have not been educated and I apologize for not being here earlier. Perhaps I am going over an area that has been tread on before.

My interest for some time has been to explore the consolidation of the administrative law judges, wherever they exist, into a central court. When I worked at the Securities and Exchange Commission as a trial attorney, it always struck me how close the relationship was between the employees of the agency who tried the cases and the employees of the agency who brought the cases, irrespective of what formal distinctions there were in terms of their roles. I am wondering how you feel about this concept.

Mr. SMITH. Well, let me say a couple of things and then I can ask our research director to comment on that.

We have a project now which began when the Congress was considering giving us the responsibility of evaluating the administrative law judges. Professor Rosenblum at Northwestern began the project and, of course, the bill to vest in the Conference the authority then died with the last Congress and apparently hasn't been revived or reintroduced at this point. But we felt it was valuable to go ahead with a study of this particular issue, of mechanisms for rating administrative law judges. I had a meeting with Marvin

Morse at OPM and have talked to him about that particular concept.

At this point our study has not focused really on that but on general mechanisms for evaluation or self-evaluation by the administrative law judges. I have some sympathy, and at our last council meeting a week ago last Thursday there was some discussion about that and concern with the whole system of administrative law judges. But currently our project is less directed than that.

Mr. GLICKMAN. There are two things that have struck me. First, I was at the conference at Williamsburg—and I think Tom Kindness was there—and I don't recall who made the suggestion, whether it was the Chief Justice or whether it was one of the other speakers, but we were talking about the enormous backlog in Federal courts and the numbers of cases. Somebody made the suggestion that we need to create a new class of judges, and it was unclear whether it was an article III judge or not, or whether it was, in fact, enhancing the present ALJ's to this new class of judges.

But whatever it was, it was implied they would be given additional responsibilities, but taken out of their agencies, and be given a greater authority than they currently have. It would be kind of a quasi-normal judge—I don't mean that in terms of there being something wrong with them [laughter]—and not give them any specialty. They would just be a class of judges who would hear cases involving appeals from agency decisions.

Now, I may be talking about two different concepts here. This could be on one side a group of judges who would hear only appeals from agency decision. On the other side, it may be the actual trial judges themselves who would be separated out into a court.

It was also expressed that we give too much credence to the specialization required of administrative law judges. As a matter of fact, they really hear cases and require no greater amount of knowledge than a normal trial judge would hear in a regular district court case, who has to learn about it very quickly. So that is the kind of issue I would like to see researched more.

Mr. LUBBERS. I have had the somewhat mixed blessing of becoming the expert on this. We have already done a few things along this line.

One thing that we did recently was cosponsor with the American Judicature Society in Chicago a workshop on the concept of a central panel of administrative law judges and how that is working in the States. There are at least seven, maybe eight now, States that have a working system like that. Of course, the number of judges in these States is quite small. New Jersey, for example, has such a panel with 40 judges. Minnesota has one, and several other States do. The findings of this workshop and some articles about it have been published in an issue of Judicature, which I can make available to you.

Also, I have done some writing on administrative law judges and have come to the conclusion personally, although our Conference has not studied this as a body, that it is time for some sort of experiment on the Federal level.

There are about 30 agencies that have their own administrative law judges now. Some of them only have one or two or a small number, whereas the Social Security Administration has over 700,

and the NLRB has about 120. In other words, if you take 25 out of the 30 agencies, they might have only about 200 judges, and all the rest are concentrated in five agencies. I think it might be feasible to set up some sort of an experimental core, taking the judges from those agencies that currently have a small number of judges, and see how that works and parcel them out to those agencies as the need arises.

Mr. GLICKMAN. Would there be the statutory authority to do that under current law?

Mr. LUBBERS. Probably not.

Mr. GLICKMAN. You would have to have legislative change to do that, right?

Mr. LUBBERS. I think so. I think Marvin Morse over at OPM has tried to set up a very small version of this in recent years. He called it a mini-pool of judges. I think he took some of the judges that had been RIFed from other agencies and used them. As I understand it, he does not now have the budget authority to do it.

Mr. GLICKMAN. Again, now, we're talking about the first category, which would be judges that would actually hear the initial trial?

Mr. LUBBERS. Yes.

Mr. BABCOCK. The unified corps concept.

Mr. GLICKMAN. That's correct.

The second concept is that one of the judges, or it may have been an attorney, at this conference said, if you added up the amount of time spent on cases heard by Federal court of appeals judges, and on appeals from the regulatory agency decisions, and compare the total amount of time, it would be significantly greater than just the number of cases that are appealed. That is, they tend to involve great amounts of time. They gave us the statistics on the law and the huge increase in the court of appeals. That's where they argued maybe about a separate appellate court for agency decisions. Theoretically, I guess you could appeal to the Supreme Court after that.

Mr. LUBBERS. I'm glad you made the distinction between these twin concepts here. There have been proposals for administrative courts for some time. The one that I think corresponds most to your suggestion here is one that Robert Bork made when he was in the Justice Department.

Mr. GLICKMAN. He may have been the one that made the suggestion because he spoke at the conference.

Mr. LUBBERS. He proposed in a pamphlet in 1977 that a lot of the so-called small cases that now flood the district courts—such as black lung cases, social security, FOIA cases, longshoremen cases, that these cases be transferred from the article III court system to an administrative review tribunal. I think that idea does deserve some further thought.

Mr. SMITH. Judge Steven Breyer, who is one of the liaisons from the Judicial Conference to the Administrative Conference recently, in a meeting we held, made that point very strongly, that every one of these cases that take up time in the court of appeals are pushing out something else that might take up more valuable judicial time and that there is a limit on judicial resources.

Mr. GLICKMAN. OK. Thank you, Mr. Chairman.

Mr. DANIELSON. Mr. Kindness?

Mr. KINDNESS. I do have one other question.

In your testimony you mentioned the uniform caseload accounting system. A portion of the testimony points out that one of the findings is that in many agencies the greatest delay occurs in the stage of agency review of the ALJ's decision.

As a result of that study—and I note you say you hope to analyze these statistics more closely in the coming year. But what reasons seem to be most prominent for that delay factor?

Mr. LUBBERS. I am not sure I can state what the reasons might be. We have instituted a study to follow up on this, to look at the structures and procedures that agencies have set up to review administrative law judge decisions.

There is a lot of variety in the agencies. Some have judicial officers, some have review boards, and in some agencies the agency head personally reviews. In other agencies there is even an intermediate review board between the agency and the administrative law judge. So we are looking into the structures.

In terms of the reason for the delay, I think it may relate to the organization of the opinion writing function within the agency and its backlog. Say at the NLRB, where you have five Board members trying to review a thousand decisions issued by a hundred administrative law judges, there is a built-in delay factor. So I think it is organizational, structural and managerial.

Mr. KINDNESS. So there is probably a good variety of factors involved in the different agencies.

There is no particular finding, I take it, such as the Sunshine Act has any effect on that part of the process?

Mr. LUBBERS. Not so far. We do, as the chairman mentioned at the beginning, we do have an ongoing study of the effects of the Sunshine Act on agency decisional behavior. We hope that this study may shed some light on such behavior. Although when agencies meet to decide to adjudicate cases, they can close their meetings under the Sunshine Act, so I would doubt that is a factor.

Mr. KINDNESS. Thank you.

Mr. DANIELSON. Thank you, Mr. Kindness.

Thank you very much, gentlemen. We will very shortly conclude this hearing, but a couple of followups.

Please tell me which subcommittee of the Appropriations Committee will actually handle your appropriations?

Mr. BABCOCK. Treasury, Postal, and general Government, sir, on both sides.

Mr. DANIELSON. Is that Mr. Alexander's subcommittee on our side?

Mr. SMITH. I believe it's Mr. Roybal's subcommittee.

Mr. DANIELSON. Is he chairman of that now?

Mr. SMITH. Yes.

Mr. DANIELSON. The other question, which really is a request, I had asked if you gentlemen would be kind enough to leave off one set of these documents. I am going to amend that, if I may, to two sets.

We will hold another hearing, which will be really a continuation of the oversight phase of this hearing, which I think has been pretty good. You have told us a lot of value, real value.

I will send you a letter asking some specific points in which we would be interested, and I think you could respond to that both in writing and in testimony at another hearing. Would that be all right?

Mr. SMITH. Certainly.

Mr. DANIELSON. In all fairness, I think some of the things that I have gleaned from this morning's hearing is that you're just as human as we or anyone else, and you have that instinct to expand a little bit. I have some doubt in my mind whether there is really any need for you to become concerned about changes in the Federal Tort Claims Act, since the Department of Justice worked diligently on that, and we try to and so on. But maybe you have a good point. So I will ask you by letter for some added information.

Along with that, I am interested in the manner and method, the formalities of the appointment process of the chairman and of the council members. Should the council members be confirmed by the Senate? I kind of doubt that they should, but it is a subject that you might give us your opinion on anyway.

The extent and nature of your use of consultants. Whether the Conference should get into substantive matters as well as procedural matters. As I perceive it, the original purpose of the Conference was to try to stick to the procedural aspect. I have noticed an understandable tendency to sort of switch over into the substantive, which is human and natural, but I think we should examine it.

You will have a letter very soon and perhaps you can give us a response, and we'll have another hearing.

Meanwhile, I want to thank you. You have come well prepared and have given us a lot of very useful information.

Incidentally, counsel has reminded me again of the executive communication which we received back in August of 1981 and which is the basis for our having introduced the authorization bill. Without objection, I will simply include it as a part of the record.

Any objections? There are none and it will so be included.

[The information follows:]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES,
Washington, D.C., August 7,1981.

Hon. THOMAS P. O'NEILL, Jr.,
House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: I enclose for your consideration and appropriate reference a proposal to amend the Administrative Conference Act, 5 U.S.C. 571-576.

The present authorization of appropriations for the Administrative Conference will expire at the end of fiscal 1982. It is the purpose of the proposed legislation to extend the authorization for an additional four-year period and to authorize for that period such sums as may be necessary to carry out the Administrative Conference Act.

Authorization legislation for the Conference was most recently enacted in June, 1978, after oversight hearings in both Houses in 1977. That legislation sought to provide for a substantially enhanced Conference program by gradually increasing the Conference's budget ceiling from $1,700,000 for fiscal 1979 to $2,300,000 for fiscal 1982. However, because of Government-wide budgetary stringency and uncertainty about the role of the Conference under pending legislative proposals for regulatory reform, the Conference has not been funded at the authorized figure. Its budget for recent years has remained level at slightly over $1,000,000.

The Conference's activities over the past three years amply justify renewal of our authorization. the Conference's comprehensive study of Federal Trade Commission rulemaking under the Magnuson-Moss Act, Pub. L. 93-637, a study directed by Congress in the Act, was completed in June, 1980. It resulted in three detailed recom-

mendations addressed to the Federal Trade Commission and to Congress. (Recommendations Nos. 79-1, 44 F.R. 38817; 79-5, 45 F.R. 2307; 80-1, 45 F.R. 46771.) The Conference adopted fourteen other recommendations in this three-year period, dealing with such subjects as agency use of private standard-setting organizations in the development of health and safety regulations (Recommendation No. 78-4, 44 F.R. 1357); agency procedures for the assessment and mitigation of civil money penalties (Recommendation No. 79-3, 44 F.R. 38824), appropriate restrictions on participation by a former agency official in matters involving the agency (Recommendation No. 79-7, 45 F.R. 2309); and enforcement of petroleum price regulations (Recommendation No. 80-2, 45 F.R. 46774).

The Conference has been extremely active in recent efforts to achieve reform of the regulatory process. the staff of the Office of the Chairman of the Conference has worked closely with the Administration and the interested Congressional committees in the preparation and consideration of regulatory reform legislation in the 95th, 96th and 97th Congresses. In the 96th Congress officials of the Conference testifed five times before Congressional committees on various aspects of the pending regulatory reform bills. The Conference staff also cooperated with the Executive Office of the President in the preparation of Executive Order12044 on Improving Government Regulations and thereafter prepared and distributed to the agencies a Guide to the Development and Evaluation of Agency Reports under Executive Order 12044 (43 F.R. 36412). Conference officials and staff have been called upon, to an increasing extent, to testify before Congressional committees, to file comments upon proposed legislation, and to consult with agency and Congressional staff on matters related to administrative procedure.

The Conference has continued its research and informational activities. Its recommendations are based on research reports, prepared by Conference consultants, and made available to the agencies, to Congress, and to the public. In addition, the Conference continues to prepare and distribute information and reports of a more general nature. In 1980 we published the second volume of statistics on administrative law judge hearings, collected by our Uniform Caseload Accounting System.

A recent consultant's report, *Federal Reorganization: What Have We Learned?*, has been published in book form. It contains a series of papers by participants in the various reorganization efforts of the last fifteen years analyzing the prospects and difficulties of reorganizations, and developing some rules of thumb for agency officials.

I believe that the Conference's program fills a continuing need in the Government. As a policy-neutral expert deliberative body, the Conference provides a necessary forum where the processes of public administration and proposed improvements can be appraised dispassionately. In addition, the Conference has a present capactiy and a still greater potential for working actively with Congress and the agencies to improve regulatory procedures, reduce delay, increase openness and public participation in decisionmaking and otherwise assure fair and effective administration.

The proposed legislation I submit would extend the Conference's authorization for an additional four years, that is, through fiscal 1986. For those additional years, it would change the authorized amount from the present figure for fiscal 1982—$2,300,000—to "such sums as may be necessary" to carry out the purposes of the Administrative Conference Act. The principal reason for the proposed change is to provide needed budgetary flexibility, particularly in order to enable the Conference to handle specific legislative assignments. As the Conference's program and capabilities have become better known, Congress has on a number of occasions assigned particular projects or responsibilities to the Conference. Examples include the study of Federal Trade Commission rulemaking, referred to earlier, and a special consultative role in the preparation of agency regulations under the Government in the Sunshine Act, 5 U.S.C. 552b(g). In the last Congress the Equal Access to Justice Act, Public Law 96-481, Title II, assigned to the Conference a similar but more demanding consulting responsibility in connection with the formulation of agency regulations, as well as a subsequent role in monitoring implementation of and evaluating experience under the Act. In addition, other assignments of responsibility to the Conference, were contained in various regulatory reform bills which were under consideration in the 96th Congress.

It is highly desirable for the Conference to be able to respond to such calls on its special skills, and we welcome those assignments which are within our capacities and consistent with our unique role and structure. However, it has been our experience that these specific legislative assignments are not usually accompanied by new budgetary authority. The result in the cases of the Magnuson-Moss Act and the Government in the Sunshine Act was the necessity to divert resources—both money

and staff—from our ongoing program. In the More recent situation, the Equal Access to Justice Act, new budgetary authority was not necessary, but only because the Conference was operating at a level considerably below its statutory authorization. Therefore, we were able to seek (although we did not obtain) a supplemental appropriation. Since it does not seem to us practicable to set an authorization figure which makes meaningful provision for unanticipated assignments, we are proposing the authorization of "such sums as may be necessary."

I attach the proposed legislation and a section-by-section analysis.

The Office of Management and Budget has advised that it has no objection to the proposed legislation from the standpoint of the Administration's program.

Sincerely yours,

LOREN A. SMITH, *Chairman.*

Enclosures.

SECTION-BY-SECTION ANALYSIS

The bill would amend section 576 of title 5, United States Code, which authorizes appropriations for the Administrative Conference of the United States. The authorization is now $2,300,000 for fiscal 1982. The bill would authorize the appropriation of such sums as may be necessary for each fiscal year from 1983 through 1986.

A BILL To Amend the Administrative Conference Act

Section 576 of title 5, United States Code, is amended to read as follows:

"576. Appropriations

"There are authorized to be appropriated sums not to exceed $2,300,000 for the fiscal year ending September 30, 1982, and for each fiscal year thereafter up to and including the fiscal year ending September 30, 1986 such sums as may be necessary to carry out the purposes of this subchapter."

Mr. DANIELSON. Very well. Unless there are further questions from the staff, we have covered the entire subject and the subcommittee will now stand adjourned subject to call of the Chair. Thank you.

Mr. SMITH. Thank you very much, Mr. Chairman.

[Whereupon, at 11:30 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

ACUS BUDGET STATUS REPORT AS OF 1/31/82

EXPLANATION OF PROJECTIONS (Continued)

2.	COMMUNICATIONS, UTILITIES & OTHER RENT Xerox 4000 ($300 x 8 mos) = $2,400 9400 ($1,800 x 8 mos) = $14,400 Telephone: Local ($720 x 7 mos) = $5,040 Long distance ($158 avg. x 9 mos) = $1,422 FTS (2 qtrs.) = $11,146 Postage: $196 x 8 mos = $1,568 Express - 4 qtrs. = $464	$ 36,440
3.	SLUC - Office rent, 2 qtrs. = $50,068) Parking, 2 qtrs. = $1,260)	51,328
4.	TRAVEL Plenary (Dec., unvouchered) = $5,000 Plenary (June?) 7,000 ACUS staff 3,000 Consultants ($459 avg. x 8) 3,672 Pub. Members ($530 avg x 8) 4,240 Council ($73 avg x 9 mos) 657	23,569
5.	PRINTING/PHOTOGRAPHY Federal Register - 3 qtrs. x $3,750 = $11,250 Code Fed Regs - 3 qtrs. x $1,500 = $4,500 Photography= $600 ALJ Manual = $3,800 Annual Report = $5,000 Other Misc. printing = $10,200 (?)	35,650
6.	ADMINISTRATIVE EQUIPMENT	ø
7.	SUPPLIES, MATERIALS & EQUIPMENT Office supplies ($1,202 avg. x 8 mos) = $9,616 Library ($1,289 avg. x 8 mos) 10,312	19,928
8.	OTHER SERVICES	23,258
	*GSA Contract ($47,000, less accounting & other services for 3rd & 4th quarter (Acct. $18,500/$1,541 mo. x 6 mos. = $9,246) 3rd & 4th qtr = $23,500 less $9,246 = $14,258 (Should be lower; when GSA provides us an actual figure)	(14,258)
	OPM Training = $1,000	(1,000)
	Miscellaneous purchase orders (avg. $1,000 x 8 mos.) = $8,000	(8,000)

ACUS BUDGET STATUS REPORT AS OF 1/31/82 - ACTUAL OBLIGATIONS TO DATE

1.	PERSONNEL COMPENSATION & BENEFITS (thru 1/31/82) = $ 227,610		Budget Authority - $1,051,000 1st & 2nd qtrs. $536,112
2.	COMMUNICATIONS, UTILITIES & OTHER RENT Equipment rental: Xerox 4000 = $1,200 " 9400 = 7,200 " " - GSA furn/eqpmt = 1,200 Telephones: Local (thru Feb.) + $3,600 " - Long distance " Deb. = $509 " - FTS (2 qtrs.) = $11,146 Postage: (thru Jan.) = $702	25,557	
3.	STANDARD LEVEL USER CHARGES (SLUC) Office rent (2 qtrs) = $50,068 Parking -(2 qtrs) = $1,260	51,328	
4.	TRAVEL ACUS staff $ 1,419 Consultants 1,836 Public Members 2,115 Council 220 Plenary Session 2,495	8,085	
5.	PRINTING/PHOTOGRAPHY Federal Register (1 qtr) = $3,750 Code Fed Regs (1 qtr) = $1,500 Other printing = $35 Photography = $433	5,718	
6.	ADMINISTRATIVE EQUIPMENT	254	
7.	SUPPLIES, MATERIALS & EQUIPMENT Office supplies = $4,809 Operating supplies - $40 Library = $5,156	10,005	
8.	OTHER SERVICES GSA Admin. support (2 qtrs x $11,750 per)= $23,500 Health room = $800 Miscellaneous purchase orders = $5,826 Research contracts = $	30,122	
	TOTAL OBLIGATIONS	$ 358,679	

ADDITIONAL MATERIAL

97TH CONGRESS
1ST SESSION

H. R. 4476

To amend the Administrative Conference Act, by authorizing appropriations therefor.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 15, 1981

Mr. DANIELSON introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Administrative Conference Act, by authorizing appropriations therefor.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 576 of title 5, United States Code, is amended to read as follows:

"§ 576. Appropriations

"There are authorized to be appropriated to carry out the purposes of this subchapter sums not to exceed $2,300,000 for the fiscal year ending September 30, 1982, and not to exceed $3,000,000 for each fiscal year thereafter

up to and including the fiscal year ending September 30, 1986.".

○

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W. SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

OFFICE OF
THE CHAIRMAN

February 23, 1982

VIA COURIER

Honorable George E. Danielson
Chairman
Subcommittee on Administrative Law
and Governmental Relations
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

In the recent hearing on our authorization bill, H.R. 4476, the suggestion was made that the authorization period be limited to two years in order to provide more frequent oversight hearings for the Conference. The Conference certainly has no objection to greater Congressional oversight and, indeed, we welcome increased interest in our activities, as exemplified by the oversight hearings now scheduled for the week of March 1st. However, we believe there are practical objections to cutting the authorization period to two years.

Enactment of authorization legislation—at least for a small agency like the Conference—requires a long lead time. Our experience has been that new authorization legislation must be transmitted to Congress fully a year before the current authorization is due to expire because of difficulties in scheduling hearings and to allow for possible disagreements between the two Houses of Congress. Furthermore, we must allow additional time for obtaining OMB clearance of the legislation prior to submission to Congress. Therefore, if the pending authorization were limited to fiscal 1983 and 1984, we would have to submit a request for new legislation covering fiscal 1985 and 1986 to OMB early in 1983, approximately a year from now. That legislation would, in the ordinary course, be sent to Congress in mid-1983, and oversight hearings would have to be held in late 1983 or early 1984 to be reasonably assured of floor action by both Houses prior to the end of the fiscal year. Thus, on this schedule, oversight hearings would be limited to our experience in fiscal 1983, and we would not be able to give any information at all concerning fiscal 1984.

Another, and perhaps more important, problem is that with a two-year authorization cycle, our budget for each alternate fiscal year must be submitted to and acted upon by OMB in advance of the enactment of authorization legislation, just as it has been for fiscal 1983. To the extent that the authorization level is intended to guide the decisions of OMB and the appropriations subcommittees, this guidance function cannot operate if the budget must be acted upon in advance of the passage of authorization legislation.

It has also been suggested as a compromise that we receive a three-year authorization. While this would postpone the problem a bit, it would in the long run be likely to create still greater problems. If our authorization were extended through fiscal 1985, renewal legislation would have to be submitted in early calendar 1984 or perhaps even late 1983. Even so, the prospects for completing legislative action in 1984 would be doubtful. If action were not completed in 1984, however, we would have to start again in

1985, with a new submission and possibly new hearings in one or both Houses. In short, since we must anticipate that our authorization will not be enacted in the same session of Congress in which it is submitted, we prefer to be on an authorization cycle which will permit submission of the bill in the first session and enactment of the bill in the second session of the same Congress.

Let me emphasize that the four-year authorization which we seek is not inconsistent with closer and more frequent oversight. Indeed, it is my understanding that this Committee has several times in recent years had an opportunity to review particular aspects of the Conference's activities. Staff of the Conference testified before this Committee in January, 1980 and April, 1981 on the regulatory reform proposals under consideration, and both these hearings, particularly the former, covered questions relating to the role and structure of the Conference, as well as its outstanding recommendations. In early 1977 the Committee held a hearing to consider the early experience under the Government in the Sunshine Act and the Conference's consultative role under that statute.

We welcome these opportunities to discuss our program with the Committee, and, indeed, it seems to us that we can have more comprehensive and meaningful oversight hearings if they are not tied to a timetable imposed by the need to enact authorization legislation.

Sincerely yours,

Loren A. Smith
Chairman

cc: Members of the Subcommittee

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

TUESDAY, MARCH 2, 1982

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2236, Rayburn House Office Building, Hon. George E. Danielson, (chairman of the subcommittee) presiding.

Present: Representatives Danielson, Moorhead, Kindness and McClory.

Staff present: William P. Shattuck, counsel; Janet S. Potts and Wade Harrison, assistant counsel; and Jame B. McMahon, associate counsel.

Mr. DANIELSON. The subcommittee will come to order.

This morning, the first item that we are to take up will be the matters relating to the Administrative Conference. The first will be to conclude our oversight work and also, hopefully, to report out on the authorization.

I am informed that Mr. Glickman will be here a little later, so we will have the four persons present needed to report out the bill. He happens to be chairing another subcommittee right now, and he could not come at this time.

I think the members all have the response from the Administrative Conference, which is dated March 1, which responds to a letter of inquiry I sent out several days ago.

Do all members have this, Mr. McClory, Mr. Kindness?

I don't mean by this letter of inquiry and the answers to limit at all the scope of any questions anyone wants to ask. I just thought it would be useful to put something down in black and white, so we would truly cover some of the subject matters.

If there is no objection, I would like to place in the record the letter of inquiry, dated February 19, 1982, and the reply, dated March 1, 1982, from Loren A. Smith, the chairman of the Administrative Conference.

Is there objection? [No response.]

Mr. DANIELSON. There being no objection, it is so ordered.

[The letters follow:]

FEBRUARY 19, 1982.

Hon. LOREN A. SMITH,
Chairman, Administrative Conference of the United States,
Washington, D.C.

DEAR MR. CHAIRMAN: During the hearing on the bill, H.R. 4476, the authorization of the Administrative Conference, I informed you of my plan to hold a general oversight hearing on the Administrative Conference in the near future.

In this additional oversight hearing, the subcommittees will focus on several areas relating to the Administrative Conference. Therefore, I ask that you prepare and submit in advance material on the following matters:

1. Should the Chairman's term be made explicitly co-terminous with that of the President or should the statute explicitly make the term one for a fixed number of years?

2. Should the members of the Council have fixed terms or serve at the pleasure of the President? Should these terms be staggered?

3. Should Congress impose greater controls on the Conference over the method of selection and the terms, including the number of terms, for which any person should serve? What efforts have been made to insure a balanced point of view among the Conference members, both with regard to professional backgrounds and diverse perspectives and viewpoints? Are there any reasons why a balanced Conference should not be legislatively mandated?

4. What are the current functions performed by the Council? Does its role involve more than the duties of "traffic cop" to insure that matters coming to the plenary session are fully prepared for a vote? What role does it play in the recruitment of staff and the development of research agenda? How closely does the Council as a whole, or its individual members, monitor the work of the individual committees?

5. What process is followed in granting research contracts? What effort has the Conference made to insure that these contracts are made with individuals who are not advocates of a particular viewpoint?

6. Should the Conference serve principally as an advisory committee on administrative law matters rather than questions of substantive law?

7. What is your projected budget for each of the years included in the authorization presently before the subcommittee?

The subcommittee expects to hold a hearing on these matters during the week of March 1.

Sincerely,

GEORGE E. DANIELSON,
Chairman, Subcommittee on Administrative
Law and Governmental Relations.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES,
Washington, D.C., March 1, 1982.

Hon. GEORGE E. DANIELSON,
Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of February 19, in which you pose seven questions regarding the structure and program of the Administrative Conference.

Question 1. Should the Chairman's term be made explicitly co-terminous with that of the President or should the statute explicitly make the term one for a fixed number of years?

Answer. The Administrative Conference Act at present provides that the Chairman is appointed for a five-year term; this term commences at his taking office, irrespective of when the term of his predecessor was due to expire.

I understand that the Department of Justice during the Carter Administration took the position that the Chairman serves at the pleasure of the President. Thus, the five-year term, like the four-year term of a United States Attorney, is only a convenience to the President in filling positions. The administrative practice, however, has been for the Chairman to continue to serve notwithstanding a change in administrations. The first Chairman of the Conference, Professor Jerre Williams, was appointed by President Johnson in 1968 and served until mid-1970, when he resigned to return to teaching. Professor Robert A. Anthony, who was appointed by President Ford in 1974, served the full five-year term. The situation of my predecessor, Reuben A. Robertson, was somewhat different. His nomination was pending late in the second session of the 96th Congress, and was confirmed on the basis of an understanding with the Republican members of the Senate Judiciary Committee

that he would submit his resignation if President Reagan were elected. This he did while greatly aiding me in the transition process into the Chairmanship.

But to turn from what the law is to what it ought to be, I strongly believe that as a practical matter the Chairman of the Conference should possess the confidence of the President. The Conference's role is, after all, solely advisory, and its advice is rendered principally to the Executive Branch. If the President and his agency heads are not willing to provide active support and encouragement to the Conference and its activities, then we will simply be "spinning our wheels."

For this reason I believe that the present law is adequate. A four-year term coterminous with the President's would also be satisfactory. However, since it is unlikely that filling the chairmanship will be the President's first order of business, there should either be a holdover provision like the one in the present law or the Chairman's term should expire, say, six or nine months after the President's inauguration.

Of course, whatever the tenure of the Chairman, I would expect that the Conference would continue to exercise its independent judgment on the matters with which it deals, and that the Chairman would act as spokesman for its positions. There would be little point in a Conference constituted like this one if it were not free "to call the shots as it sees them." The Conference is only as good as its credibility with both the Congress and the Executive Branch.

Question 2. Should the members of the Council have fixed terms or serve at the pleasure of the President? Should these terms be staggered?

Answer. For the same reason that I believe the Chairman of the Conference must possess the confidence of the President, I believe it is important that an incoming Administration be able to place on the Council members in whom it has confidence. Our present statute provides that members of the Council are appointed for three-year terms. It says nothing about removal. The Administration took the position, with which I agree, that notwithstanding the three-year term the members served at the pleasure of the President, and several holdover appointees were replaced. This action was not subjected to legal challenge. Whereas Council members do not carry out regulatory functions, I do not believe the current law should be changed.

On another related matter, the drafters of our Act contemplated that the membership of the Council (excluding the Chairman) would be evenly divided between public and Government members. The statute provides that a change in the member's employment status, whether from non-Government to Government or vice versa, terminates his appointment to the Council. Unfortunately, the statute does not require, but merely permits five Government members on the Council. In the previous Administration the principle of a five-five division was, for the first time, not adhered to. The President recently restored the traditional balance, and I believe will maintain it. I would have no objection to mandating such balance, though I feel the tradition will suffice.

Question 3. Should Congress impose greater controls on the Conference over the method of selection and the terms, including the number of terms, for which any person should serve? What efforts have been made to insure a balanced point of view among the Conference member, both with regard to professional backgrounds and diverse perspectives and viewpoints? Are there any reasons why a balanced Conference should not be legislatively mandated?

Answer. I do not recommend that Congress impose greater controls over the method of selection or terms of members. We all share the goal of a balanced Conference membership, and the present statute does a great deal to ensure balance.

Let me describe the present structure of the Conference. In addition to the Chairman and the ten Council members (who now are evenly divided between non-Government and Government members) there are 80 members of the Assembly. These include 45 agency members designated under section 573(b)(2), (3) and (4) of the Act and 35 public members appointed for two-year terms by the Chairman with the approval of the Council under section 573(b)(6). (Under the statutory formula the number of public members could be as low as 31 or as high as 36.) Within the category of public members the statute directs that the selection be made "in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or other specially informed by knowledge and experience with respect to Federal administrative procedure." It seems to me that this provision goes about as far as legislative language can go to require balance in selections. With respect to Conference efforts to insure balance, I can speak with some detachment because I have appointed only two public members, but I understand that my predecessors have exerted considerable care and effort in selecting balanced slates of public members. Let me emphasize that the task is not

easy because we are attempting to achieve a number of different "balances." First, while most public members are drawn from the practicing bar, we always have a number of leading academics, and we try to select several members from State and local government. Second, since the practice of administrative law tends to become rather specialized, we try to get an appropriate mix in terms of subject matter expertise. Third, we try to find members who will reflect the concerns of the various groups and interests who appear before agencies and are affected by agency action. Thus, we seek not only members who represent business interests subject to regulation, but also those who customarily represent environmental, consumer, or minority group interests. Finally, we are, of course, interested in broad geographical representation, although it is, of course, more difficult for out-of-town members to attend meetings, and, incidentally, more expensive for us.

The question of a limit on terms of public members deserves separate consideration. There is obviously a tension in an organization like the Conference between the need for a reasonable turnover in members an infusion of new blood, if you will, and the desire to retain those old members who are most familiar with the work of the Conference and who have demonstrated ability and, most of all, willingness to serve. The first bylaws of the Conference imposed a limit of three successive terms for public members, but before this rule could bite, it was amended in 1974 to permit no more than ten percent of the public members to serve beyond a third consecutive term. This formula was followed until 1980, when the three-term limit was waived for a two-year period because the chairmanship of the Conference was vacant and it was thought necessary to provide continuity in committee leadership.

I am inclined to agree that the Conference would benefit from a higher rate of membership turnover than we have had in recent years, but the 1980 situation was unusual and I think that under the circumstances the Assembly was wise to waive the limit. This demonstrates, I think, that a statutory limit on consecutive terms would probably not be a good idea. We are presently considering possible by law amendments to deal with the question.

Question 4. What are the current functions performed by the Council? Does its role involve more than the duties of "traffic cop" to insure that matters coming to the plenary session are fully prepared for a vote? What role does it play in the recruitment of staff and the development of research agenda? How closely does the Council as a whole, or its individual members, monitor the work of the individual committees?

Answer. Our statute gives a number of functions to the Council, which, collectively, give it far more of a role in this agency's activities than merely to act as a "traffic cop" for proposed recommendations. These functions are as follows:

(1) Designate those departments and agencies that shall have more than one member;

(2) Approve or disapprove the Chairman's nominees for public membership;

(3) Determine the time, place and agenda of Plenary Sessions;

(4) Propose to the membership bylaws and internal rules and procedures;

(5) Review and transmit to the membership, together with the Council's views, proposed recommendations and statements from Conference committees;

(6) Designate all officers of the Conference other than Presidential appointees;

(7) Approve or revise the budgetary proposals of the Chairman, and

(8) Approve or disapprove the Chairman's proposed committee assignments.

In addition, the Council can be (and now is) used as a body of senior advisors on all major matters of concern to the Chairman. This advisory work includes a major role in the development of our research agenda. The Council, at its most recent meeting on February 4th, thus began a detailed review of each of the Conference's current research contracts. This review process, which produced several suggestions concerning the direction of the contracts discussed, will continue at the Council's next meeting, which will take place in March.

The Council, on the other hand, has no role in the recruitment and selection of staff. Under our statute this function is given to the Chairman, who is directed to "appoint and fix the pay of employees, define their duties and responsibilities, and direct and supervise their activities."

Each member of the Council is appointed as a liaison member to one of the nine standing Conference committees. As a liaison member, the Council member has privileges of the floor at the committee's meetings but cannot vote. This system is thus not designed to encourage "monitoring" (in the sense of controlling) the activities of the committee, but is rather intended to facilitate an informal interchange of ideas between the two bodies prior to the formal submission of a proposed committee recommendation to the Council.

The Council's role with respect to proposed recommendations is to review and discuss proposals referred to it by our committees, and then to transmit a proposal to the full membership, accompanied by the Council's own views on the merits. In practice, the Council has usually forwarded a recommendation either with approval, more rarely with a flat disapproval, or, on many occasions, with a separate statement suggesting one or more amendments.

In the event that the Council does propose amendments, these proposals serve to focus the debate by the membership at the Plenary Session. While the Council has the statutory right to set the agenda for Plenary Sessions, and thus could frustrate consideration of a proposed recommendation by refusing to place it on the agenda at all, the Council has never done so, so far as present staff can recall.

Question 5. What process is followed in granting research contracts? What effort has the Conference made to insure that these contracts are made with individuals who are not advocates of a particular viewpoint?

Answer. Our research contracts are all individually negotiated with the proposed contractor. The project commissioning process involves two key considerations: first, determining that work on a particular subject would be beneficial to the Conference's mission and, second, finding a contractor who is both willing and (in our opinion) able to produce a worthwhile research report in a reasonable time. The second part of the process—finding a competent contractor who is interested in working on a particular project— is invariably the more difficult of the two. This is because the funds that we are able to devote to our research contracts are usually not of a sufficient magnitude to attract a researcher who is not already interested in working on the subject for his or her own professional reasons. (This situation is to the benefit of the Conference, of course, in that the contractor therefore usually is not interested only in producing work that will minimally satisfy the standards for payment, but is motivated to produce a document that is scholarly, well thought out, and will make a real contribution to the Conference's work.)

We locate potential consultants by reviewing the legal literature to see who has already published in a particular area, and by consulting our present and former members who are law school professors, deans, and/or involved in bar association and other similar activities. On occasion, we also contacted by persons interested in becoming consultants to the Conference.

We do not attempt to insure that contractors are not "advocates of a particular viewpoint." Indeed, since we attempt to contract with persons who are already knowledgeable in a particular area, most of our contractors will have taken positions on the issues that our contract concerns, or on issues closely related to them. The question that concerns us is rather whether the contractor can produce a piece of work that intelligently deals with the subject at hand—discussing the subsidiary and main issues, setting out the arguments on both sides of a question, fairly presenting alternative solutions, and so forth. While the Conference committee that is deliberating on a project is usually interested in the consultant's views on proposed recommendations, the committee members make up their own minds on the questions presented (as, subsequently, the Council and full membership do also), and the consultant's own viewpoint is simply not a key issue. Disclosure of viewpoints, rather than a proscription against having viewpoints, is the principle on which the Conference members operate (see, e.g., Question 3), and we use this same rule in our selection of and dealings with Conference consultants.

Question 6. Should the Conference serve principally as an advisory committee on administrative law matters rather than questions of substantive law?

Answer. The Conference's present mandate is to study matters relating to "administrative procedure" and to make whatever recommendations to administrative agencies, the President, Congress, and the Judicial Conference that the Conference considers appropriate. "Administrative procedure" is very broadly defined in our Act, as follows:

(3) "administrative procedure" means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency descretion.

We see no advantage of broadening our statutory mandate. The Conference's recommendations—which of course are not binding—are respected only because the membership is thought to have expertise (as well as political neutrality) on the subjects that we address. Our members do not have, as a whole, expertise in any one particular substantive area—such as tax, anti-trust, or food and drug law—and we

therefore doubt that the Conference could address matters outside its present mandate with any credibility.

Quesion 7. What is your projected budget for each of the years included in the authorization presently before the subcommittee?

Answer. The President's budget request for fiscal year 1983 asks for an appropriation of $1.339 million for this agency. If Congress appropriates these funds, we will be able to resume the commissioning of research projects at the level of our fiscal year 1981 activities and, in addition, we will have sufficient funds to increase the number of staff attorneys (currently six, down from a fiscal 1980 high of seven) by one or two persons.

Since we do not as yet have an authorization level for fiscal years 1984 and beyond, we do not know the exact level of funding we will request from OMB for those years. We believe, as we said in our recent testimony on H.R. 4476, that the Conference saves the Federal government much more money than it costs. Thus it is likely that we will request the full amount authorized by Congress (if Congress authorizes specific sums).

Please let me know if I can supply any additional information.

Sincerely yours,

LOREN A. SMITH *Chairman.*

TESTIMONY OF LOREN A. SMITH, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY STEPHEN BABCOCK, EXECUTIVE DIRECTOR; RICHARD BERG, GENERAL COUNSEL; AND JEFFERY LUBBERS, RESEARCH DIRECTOR

Mr. DANIELSON. Happily, sir, in your letter, you have restated the questions and then put out the answers, which makes it a lot easier to read and tie them together.

The statement is in the record, but if I may summarize, and then let's go through these one at a time.

Your position on the first question as to whether the chairman's term should be made explicitly coterminous with that of the President, or should the statutory term be for a fixed number of years, is that you don't think there should be any changes made. Your impression is that as a matter of fact, it tends to work out as being coterminous with the President. Is that not basically it?

Mr. SMITH. Yes, Mr. Chairman, that is exactly the position.

Mr. DANIELSON. The piece of saving grace for a 5-year term there is your comment that the chairman of the Administrative Conference probably is not the top-most priority in the President's appointing agenda.

Mr. SMITH. Unfortunately, that is true.

Mr. DANIELSON. He gets down through the Secretary of State and the Secretary of Defense before he reaches the Administrative Conference. Therefore, it might be good to have a carryover for a few months to provide him with a little latitude. Isn't that about the essence of it, though?

Mr. SMITH. That is true. I think that maybe the Chairman of the Administrative Conference should be before the Secretary of State, but I think the President and others would disagree with that.

Mr. DANIELSON. It is a legitimate question. However, I think we should reserve that debate for another forum, perhaps. [General laughter.]

Mr. DANIELSON. What objection would you have to having a fixed term so that 5 years means 5 years?

Mr. SMITH. My one concern would be that the chairman, in order to be effective—since most of the advice that the chairman gives is

to the executive branch agencies, and he works with executive branch agencies, and most of the membership in the Conference from the executive branch are political appointees—the chairman has to have the confidence of the President and the executive branch and he has to be seen as part of the same team. Having the term subject to the same kind of discretion as other executive branch officials would facilitate that.

Mr. DANIELSON. You know, I understand your arguments, and they have merit. We always run into this situation. Happily, our administrations change. We have Republicans. We have Democrats. Maybe someday there will be something else, I don't know, but it will not be in my lifetime.

It is sort of customary for the members of a party which is in the White House to think in the context that this is the way it is always going to be, "Let's throw those other old rascals out, and put in our fine people." But then, 4 years later or 8 years later, whatever it may be, people change their mind and you get somebody else in there.

Then the outs figure, "Why should we interfere with that 5-year term," or whatever it may be, "Let's not let the spoils system come into effect, and throw out the ones who are in and bring in new ones." That is repeated every time there is a change in administration, be it Republican or Democrat. This thing always comes up.

Your feeling, though, is that having a closer relationship to the President, as you say, permitting the President to have greater confidence in the chairman is important enough to allow that 5-year term to be blurred somewhat, and try to conform to the change of administration.

Am I about right on that?

Mr. SMITH. Yes, I think that is exactly right.

Mr. DANIELSON. Mr. Kindness, or Mr. McClory, would you like to pursue any portion of that question?

Mr. KINDNESS. No, thank you, Mr. Chairman. I have no question on that. I think it is very worthwhile to bring up at this point, but I am satisfied with the exploration of it.

Mr. MCCLORY. I have no questions.

Mr. DANIELSON. If my senior colleagues over here nod acquiescence, I am certainly not going to pursue that one any further.

The second question we had was, "Should the members of the Council have fixed terms or serve at the pleasure of the President? Should they be staggered?

Let me recap again. It is my understanding that the terms are 3 years?

Mr. SMITH. Yes, Mr. Chairman.

Mr. DANIELSON. Also, by statute, supposedly there are five people from Government agencies and five people who are from the public sector. If any of these persons changes his or her status, they leave the council and there is a new appointment.

Mr. SMITH. Right, their term automatically ends at that point.

Mr. DANIELSON. The terms were, I think, originally coterminous, since everybody of the first council was probably appointed at about the same time—the No. 1 council way, way back.

Mr. SMITH. I am not sure if that is the case. Let me ask my Executive Director and Chief of Staff to answer that question.

Mr. BABCOCK. When the statute was first passed, Mr. Chairman, there was a provision for staggered terms. Three persons were appointed for a term of 1 year, and three persons were appointed for a term of 2 years, and, I guess, four were appointed for a term of 3 years. Then when the statute was recodified in 1966, 2 years after it was passed, when all of title V was recodified, they took out that staggering provision.

The Conference initially had taken the position that they ought to be staggered, and had put in a bylaw to that effect that they would remain staggered. However, the first new appointment after the initial appointments, and this was by President Johnson, ignored the staggering provision and appointed a new person to a full 3-year term, not for the remaining portion of the term that the new man's predecessor had been in. The Conference, faced with a fait accompli, amended its bylaw to take out the provision.

So initially there was staggering, but in the statute they did not put in the magic words, "and any new appointee shall serve the unexpired portion of the term to which his predecessor was appointed."

Mr. DANIELSON. I get your point.

Mr. BABCOCK. It was intended, but it was not completely expressed in the original statute, and it got lost.

Mr. DANIELSON. But it would seem that through the natural occurrence of events, through various forms of attrition, resignation, death, whatever, the terms, if they are always 3-year terms, would automatically tend to become staggered.

If someone who had served for 1 year died, for example, and his successor was appointed for 3 years, that one would be out of phase with the others. Is that a fact today?

Mr. BABCOCK. No, it is not, Mr. Chairman. It is logical that it might have worked out that way, but as a matter of fact what has happened in the past is that the White house has tended to let people sit in expired terms, because the statute does say that if a person's term expires, he will continue to serve until his successor is qualified. They will let a bunch of expired terms build up, and then make a batch of appointments. This has happened over the years several times.

Mr. DANIELSON. Are all of the present council members serving terms which would have commenced or would expire at the same time?

Mr. SMITH. No, there is a slight difference. The term of eight members of the present council will expire in November, and two will expire in February 3 years hence.

Mr. DANIELSON. I see.

Your feeling, though, is that the present system should just remain in effect, that it is working satisfactorily?

Mr. SMITH. I think it is working out satisfactorily. There are two requisites of the council that I think are important.

One, that there is a balance between Government and the private sector. When I came to the Conference, there were no Government members on the council. The statute was originally designed, I think, to contemplate five Government members and five private members, but the only provision in the statute is that there shall

be no more than five Government members. So theoretically, there could be 10 private members.

At the time I came in there were no Government members. The balance now is five and five. I think that it is important, for the balance of the conference, and in doing what the Conference should do, to have the appropriate mix.

I also think that it is important that the Council be a working group that participates and comes to the sessions. That, I think, is part of the mix that makes it effective. So there is not only a balancing of viewpoints and responsibilities, but a balancing of personalities, in getting a group that can work together.

Mr. DANIELSON. Is the present composition of the council such as to draw from different fields of professional or business expertise, to bring in a varied set of points of view?

Mr. SMITH. I think it is. We have Walter——

Mr. DANIELSON. Don't go through the whole 10, we don't have that much time. Try to give just a response to the question.

Mr. SMITH. I think it is. I think it is very well balanced from academic, Government, business, and practicing lawyers.

Mr. DANIELSON. Mr. Kindness, Mr. McClory, do you have any questions?

Mr. KINDNESS. No questions, Mr. Chairman.

Mr. MCCLORY. I have this question, Mr. Chairman.

In your answer you indicate that certain persons were replaced, when the President asked them to go, and it didn't result in any litigation. I just wonder whether your answer indicating the fixed term contemplates, with respect to perhaps very undesirable persons, this replacement would occur because it did occur just recently?

Mr. SMITH. I would think that if a person showed no interest in coming to the council, and did not participate, and didn't meet his responsibilities, then there would be grounds for replacement.

Mr. MCCLORY. I am not thinking about a person not coming, not showing up. I am thinking about a person coming and disrupting the whole Administrative Conference.

Mr. SMITH. I think that would also be grounds for replacement. I think under current law the person is subject to removal by the President for whatever cause.

Mr. MCCLORY. You think he is?

Mr. SMITH. Yes.

Mr. MCCLORY. You don't think there is any need for a change in the law in order for that to be accomplished?

Mr. SMITH. No, I don't think there is.

Mr. MCCLORY. Is that because of the experience that you had which involved replacement with no litigation of the issue?

Mr. SMITH. No, that was really citing that there had been no legal precedent established by the recent change in the council. I think the reason there is no fixed term now that is not subject to Presidential removal is because of the nature of the body. There is no limitation in the statute for removal. There is no quasi-judicial, or quasi-legislative function that would take the entity out of the President's power to remove.

Mr. MCCLORY. Thank you, Mr. Chairman.

Mr. DANIELSON. Thank you, Mr. McClory, you have brought up an issue and I am awfully glad you have done so.

There is a difference of opinion on the Hill, and I am certainly not able to say who is right and who is wrong. In the statutes where a board or commission is put together, there are fixed terms described, but they are silent on whether or not the President can remove them other than for cause.

There is now a dispute as to whether or not they are indeed so removable. I don't know, and I suppose that maybe some day that will have to be litigated by somebody. I would like to avoid litigation, if we can, and that is why I think it is good to have some kind of record here.

I think, Mr. McClory, that the point which you related there, if there is someone who comes and, let's say, makes a nuisance of himself, causes a disruption, and so on, that certainly should be cause for removal. These boards and commissions have to function.

You have to be a little careful to distinguish between pesky conduct, on the one hand, which is not acceptable, and an expression of an honest difference of an opinion on a subject, which always results in a debate, which is not intended to disrupt.

I would think that in all of these, the President should have the power to remove for cause, I believe, either misperformance or even nonperformance, as in cases where somebody fails to attend a reasonable number of times without due cause. But I am not so sure but what the need for continuity is a good argument to let terms expire every now and then.

Would you care to add anything to your comments?

Mr. SMITH. One point. Currently, a third of the members of the council have served on the council over a relatively long period, I think they have served more than two terms, and 2 of the 10 members have served more than three terms on the council. So there a fairly wide range of continuity right now.

Mr. DANIELSON. I see. Due to the multiple term factor, which I was not thinking about, they don't all walk out at the end of 3 years.

Mr. SMITH. No. As a matter of fact, one of the members has been there since he was appointed by President Johnson at the inception of the conference.

Mr. DANIELSON. I thought I detected a note in your written answer to the effect that perhaps there could be too much of a good thing, and maybe some having been there quite a while, probably should make room for new ideas.

Mr. SMITH. I think that both of those are important attributes of the conference. In order to continue to be effective, the conference needs new blood and continuity, and the blending is important.

Mr. DANIELSON. You don't think there is enough of a problem to require a change in legislation?

Mr. SMITH. No, I don't believe so.

Mr. DANIELSON. Mr. Kindness, and Mr. McClory, you are not only welcome, you are invited to chime in whenever you feel like it. In fact, I urge that you do, if you would.

Let's move to the next question, which was: "Should Congress impose greater controls on the Conference over the method of se-

lection and the terms, including the number of terms, for which any person should serve?"

Your feeling is no, everything is going fine; is that correct?

Mr. SMITH. I believe that is true for really two reasons. I think any method of control over the selection would be couterproductive, for example, of the normal commission makeup having no more than a majority from any one political party just would not work in the Conference, since more than half the Conference comes from Government, presumably made up largely of political appointees.

Plus, the complexity of the Conference requires us to balance a whole bunch of factors. We try to get a certain number of academics, and a certain number of practicing lawyers, and the administrative law field is not that large.

One of the problems we have is that our universe, because the job is a nonpaying job, is not as great as the universe may be for potential Commissioners of the FTC or the FCC.

Mr. DANIELSON. Then, of course, they are not functioning on the council quite as commissioners either, are they?

Mr. SMITH. No.

Mr. DANIELSON. They are on sort of a consultative basis?

Mr. SMITH. They advise, and they are an advisory group, and that is different. I think you are right, Mr. Chairman, it is a different kind of an organization from the group that has regulatory power.

Mr. DANIELSON. On the fourth question, you have explained how you feel that the council acts, other than as a traffic cop. You do have quite a few items there.

Can the chairman overrule the recommendation of the council, or is it strictly advisory, or does it have a governing type of effect?

Mr. SMITH. No, it has a governing type of effect. I will defer to my general counsel on the specifics of that, but in all of these areas the council, with the chairman as the presiding officer, makes the final decision.

To my knowledge, the problem, going back to the inception of the conference, has not been a conflict between the chairman and the council, but rather the chairman's efforts to get the council involved and keep them from becoming a total rubberstamp. You really want their advice and their participation.

Mr. DANIELSON. You are not aware of conflicts between chairmen and council, then?

Mr. SMITH. None to my knowledge. In fact, in talking to several of my predecessors, three of my predecessors before I took the position, all of them told me that the biggest problem I will have is getting the council to come to the meetings and be involved and participate. None of them could actually remember any conflict with the council.

Mr. DANIELSON. The financial incentive is small. I think you said you try to have a geographical distribution, so it must be tough to get people from the West Coast to the meetings.

Mr. SMITH. We have a couple of people who have come from California, but that does present a problem when there is no financial reimbursement. We want to get people who are active in their

field, who are leaders in their field, and that means they are busy people.

Mr. DANIELSON. When you have a council meeting—I believe it is ten members beside yourself.

Mr. SMITH. Yes, 10 members.

Mr. DANIELSON. How many attend on the average?

Mr. SMITH. I was told by my predecessors that the three meetings I had were all way above average. We had 8, 9, and 10 at our three meetings we have had. I am told by one of my predecessors who served for 3 years that that was phenomenal. He said he couldn't remember a meeting where he ever had nine.

Mr. DANIELSON. That is very interesting.

You don't have a quorum requirement, do you, for the council?

Mr. SMITH. I believe we do.

Mr. BERG. I don't believe there is a specific provision, but in the absence of a specific provision, the rule is a majority.

Mr. DANIELSON. So you need five members plus the chairman.

Mr. BERG. That is right.

Mr. DANIELSON. We had a Bicentennial Commission, Mr. Kindness, you may remember. I don't know how it started off, either as a commission or an administration. It did not work because they could never get a quorum.

So we turned it around and made it the other thing, then we by law made the quorum something like six members or something like that, which was far less than half. Then, they were able to get a quorum, and we did have a bicentennial. It would have been awful if we had had to skip 1976. It just would not have worked at all. [General laughter.]

Mr. Kindness, Mr. McClory, do you have anything along this line you want to ask?

Mr. KINDNESS. No questions, Mr. Chairman.

Mr. MCCLORY. No, thank you, Mr. Chairman.

Mr. DANIELSON. You have done a very good job, sir. We can't seem to get any debate going here.

On research contracts, I do want to go into that a little farther. Your current budget is something like $1.3 million; is that correct?

Mr. BABCOCK. No, it is not, Mr. Chairman. We hope to have $1,339,000 in fiscal year 1983. At the moment, we have $1,051,000. That is our current continuing resolution, the annualized level.

Mr. DANIELSON. You have a lot of basic, I am going to call them overhead expenses that must go against that first. You have salaries of your permanent employees and of your part-time employees, also.

Mr. BABCOCK. That is right.

Mr. DANIELSON. And miscellaneous office expenses, and I am not good enough in accounting to isolate them.

Mr. BABCOCK. That is correct, Mr. Chairman.

Mr. DANIELSON. How much money remains left out of this year's budget that can be used for contracting services?

Mr. BABCOCK. At the moment, it is virtually zero, Mr. Chairman.

Mr. DANIELSON. Think of the year as a whole, what was available for contracting?

Mr. BABCOCK. We are in fiscal 1982, and because we did not get our pay raise supplemental which we had been counting on to give us enough to do contracting, we are right down to zero dollars.

As I was telling Congressman Kindness before the hearing, we have a plan underway to convert our financial accounting operation which, if it takes place on April 1, will yield us perhaps $10,000 in savings over what we have projected in our official budget. So that money will be dumped into research.

Also, we try to save whatever we can out of our various object classes, and at the end of the fiscal year, if we have come up long, then we can throw that money into research. This is the so-called September buying, which a lot of people object to, but it is the only way we can spend our meager appropriation and get the most bang for the buck out of it. So we may come up with $15,000 or $20,000 by the end of the year for research.

Mr. DANIELSON. What you are talking about is money that may possibly still remain in the till to be used.

Mr. BABCOCK. That is right, Mr. Chairman.

Mr. DANIELSON. During the year, how much money were you able to devote to contracts?

Mr. BABCOCK. During the current fiscal year?

Mr. DANIELSON. During the entire fiscal year. I am not asking what do you have left in your purse, but of the total money in your purse at the beginning of the fiscal year, what amount will have been used for research when you are all done?

Mr. BABCOCK. If you mean, what percentage of the total effort of the agency, the staff work, the staff time, everything that is devoted to our research program——

Mr. DANIELSON. No, that is not what I am talking about. We are talking about two different things, so let's start over again.

How money during the fiscal year will you find, in final analysis, was used for research contracts, for consultative type contracts?

Mr. BABCOCK. I would guess that we will have spent $15,000 to $20,000 by the end of this fiscal.

Mr. DANIELSON. Over the whole fiscal year?

Mr. BABCOCK. Over the whole fiscal year, maximum.

Mr. DANIELSON. That is what I was after. I know you have your staff working on things, but we are talking contracts.

Mr. KINDNESS. Mr. Chairman, on that point, I would like to clarify.

Mr. DANIELSON. Yes.

Mr. KINDNESS. Is that $15,000 to $20,000 based on the $10,000 that you are contemplating, as you tried to explain a little while ago, saving on the accounting system?

Mr. BABCOCK. Yes, it is, Mr. Kindness.

Chairman Danielson asked at the hearings before for information on this year's budget and next year's projection. I have Xeroxed and distributed to the staff the page out of the President's recent budget which pertains to us. That information you have before you, if you are interested. It shows how we propose to spend our $1,051,000 this year, how we are spending it, and how we propose to spend the $1,339,000 we will get next year.

You will see that we are down this year substantially. Last year, we had $1,167,000, and we were able to devote about $140,000 of

that money last year to research. But we have taken a cut, like many other agencies, so this year we are down, right at the moment, to zero for research in terms of our budget.

As I said, I think we will end up, if we can shave a little bit here and there—on travel expenses, personnel expenses, this, that, and the other thing—with $15,000 or $20,000 for research during the current fiscal year.

That does not mean, I should say, that our research program is dead because we have many good and valuable projects, which were commissioned out of last year's money, that are still going on.

Mr. SMITH. I would add that in fiscal year 1983, we would hope to be back up approaching the levels that we were in fiscal year 1981.

Mr. DANIELSON. What was that level, dollarwise?

Mr. SMITH. That was about $140,000 in money available for outside contracting.

Steve, is that approximately right for fiscal year 1983?

Mr. BABCOCK. We will have at least that much money in fiscal year 1983, if we get our $1,339,000, yes, sir.

Mr. DANIELSON. I am not a good accountant. Where do I find that data on the sheet I have in front of me?

Mr. BABCOCK. The research?

Mr. DANIELSON. Yes.

Mr. BABCOCK. There is not a separate listing for research. It is object class 25, other services.

Mr. DANIELSON. What column?

Mr. BABCOCK. It is on the upper right-hand corner of the page. This is a prescribed Government accounting system. We have tried to get them to let us break out research contracts separately and they won't. But other services includes our GSA support contract, and some things in addition to research.

Mr. DANIELSON. Then it would be under the 25, other services, and included within that lump sum; is that right?

Mr. BABCOCK. Yes, sir.

For fiscal year 1981, the figure you see there is $172,000, and of that about $140,000 was for academic research contracts. For fiscal year 1982, the current year, you see a figure of $56,000, and that is zero. You see, our GSA bill went up to $56,000, and as I said we are trying to cut that down effective April 1 by stopping some of the services we get from them, and starting up our own completely separate financial accounting and disbursing system.

Mr. DANIELSON. That is the area from which you hope to be able to salvage maybe $10,000 or maybe $15,000 which could go into contracted research?

Mr. BABCOCK. Yes, sir. Also, we are trying to hold our travel expense down, so we may get a little money there. Our printing and reproduction, you see it is already way down from last year, and printing expenses are also down.

Fortunately, enough, there are a lot of printers in real trouble in this area, and our annual report for this year, I think, will cost not much more than half of what it cost last year because these people are submitting very, very low bids to the Government Printing Office. So we are fortunate there. We may be able to shave some out of that $36,000.

Mr. DANIELSON. Next year's figure of $224,000 is, of course, your hoped for figure?

Mr. BABCOCK. Yes, sir.

Mr. DANIELSON. What would you anticipate being able to use for contracted research?

Mr. BABCOCK. About $180,000 of that.

Mr. DANIELSON. Thank you. It is kind of hard for a person who is not an accountant and not schooled in these things to isolate these data.

The $10,000 or $15,000 you referred to, and Mr. Kindness referred to, would then be salvaged, if at all, out of that $56,000.

Mr. BABCOCK. That is correct, Mr. Chairman.

Mr. DANIELSON. Mr. Kindness, or Mr. McClory, do you have anything further along this line?

Mr. KINDNESS. Yes, Mr. Chairman.

Mr. DANIELSON. Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

Let's return to the section for fiscal year 1983, and the category 25, other services, and the figure of $224,000. Just a moment ago there was reference to $180,000 approximately as the goal for contractual services.

Could we go over what else comprises that $224,000 figure?

Mr. BABCOCK. Mr. Kindness, there is one principal other expense which is our GSA support contract. GSA has something called the External Services Division, and they provide various kinds of supporting services for small agencies. For example, they provide our payroll.

Our payroll is prepared in an office out in Kansas City. It is an excellent service. They don't charge that much for that particular service, and that is one we intend to continue with. We send our paycards out to Kansas City, and they cut the checks, they keep all of the retirement accounts, the amounts that get credited, and all that sort of thing, the leave accounts; everything is done in Kansas City.

They provide personnel services for us, advice to me and to my administrative officer on questions of classification, RIFing, if we had to do that, furloughs, if we had to do that, promotion policies, SES, all the personnel stuff.

Mr. KINDNESS. Thank you. That is enough detail on that, I was just trying to get the outline.

What is that figure for the current fiscal year, this 25.0?

Mr. BABCOCK. Yes, Congressman Kindness, it is $56,000 for the current fiscal year.

Mr. KINDNESS. That is the total?

Mr. BABCOCK. That is right for that object class, and that is the GSA contract. There are a couple of other odds and ends that go into that object class, but basically it is that GSA contract.

Mr. KINDNESS. What was it in fiscal year 1981?

Mr. BABCOCK. It was $172,000, the total in that object class.

Mr. KINDNESS. What was the GSA contract?

Mr. BABCOCK. The GSA was $47,000.

Mr. KINDNESS. It was $47,000?

Mr. BABCOCK. Yes, sir.

Mr. KINDNESS. It went up to $56,000.

Mr. BABCOCK. Yes, sir.

Mr. KINDNESS. So it is an increase of $9,000?

Mr. BABCOCK. That is correct, sir, from $47,000 to $56,000, a $9,000 increase.

Mr. KINDNESS. I would like to straighten this out and make sure that we have it clear. For fiscal year 1981, the GSA charge for services was $47,000, and for the current fiscal year it is $56,000.

Mr. BABCOCK. That is correct.

Mr. KINDNESS. And you are contemplating in fiscal year 1982 that it will be about $44,000?

Mr. BABCOCK. It will not be quite that much. There are a few odds and ends in that object class, but it will be almost that much.

Mr. KINDNESS. The standard level user charges, what is that?

Mr. BABCOCK. That is rent, sir. GSA has really socked it to us, along with most other Federal agencies. Everybody got a big increase this year. Last year we were paying $57,000 and this year it is $103,000, and that is for the same space.

Mr. DANIELSON. For rent, you mean?

Mr. BABCOCK. Yes, sir, that is rent.

Mr. DANIELSON. Thank you.

Mr. KINDNESS. Rent and security?

Mr. BABCOCK. No, rent, period. Nothing but rent. Standard level user charges is what they call it, but it is just plain old rent.

Mr. KINDNESS. You are not contemplating much of an increase for fiscal year 1983?

Mr. BABCOCK. No, we aren't. We may get a small chunk of additional space. There is an empty room on the right-hand side of our existing office that we are trying to get from the FTC. If we get that, then that figure will have to be revised. The $104,000 will have to go up to maybe $115,000.

As it is, we do not have a very good meeting room for our committees and our council. Our chairman has chatted with their chairman to see if we can work out an arrangement whereby we can get the space.

If we continue with our existing space, which is, I would say, in total about the size of this room in terms of floor area, then our charges will remain virtually the same.

Mr. KINDNESS. Thank you, Mr. Chairman.

Mr. DANIELSON. Mr. McClory.

Mr. MCCLORY. Mr. Chairman, if you would permit me to revert to question No. 3 just for one question.

Mr. DANIELSON. Certainly.

Mr. MCCLORY. This has to do with the membership and the tenure and the right to succeed as far as additional terms are concerned.

First you indicate that the law is perfectly all right the way it is, and everything is working out fine. At the end you say, "We are presently considering possible bylaw amendments." At first I thought you were considering amendments to the statute, but you are only considering a bylaw amendment.

Mr. SMITH. That is correct, Congressman McClory. We will consider a bylaw to take advantage of some of the senior members of the conference who have been in the conference for more than three terms, and allowing us also to have some new people in.

Mr. McCLORY. I have been trying to find out whether or not there are any amendments to the statute that seem to be needed. You don't indicate that there are any amendments to the statute establishing or providing for the operation of the Administrative Conference. We have all the legal framework we require.

Mr. SMITH. I think we do. There are some minor things. Increases, perhaps, in the membership of the conference, which might bring in some more agencies that have grown up since the conference was created. Largely the problems that the conference has had have been inadequate funding, rather than the legal structure.

Mr. McCLORY. Thank you very much, Mr. Chairman.

Mr. DANIELSON. I note that in that 25, the other services, it would seem to me that if you hope to have $180,000 available for research services in the next fiscal year, if your total amount is $224,000, it will leave you only $44,000 for GSA function, et cetera, which is a reduction from this year as I see it.

Mr. BABCOCK. That is correct, Mr. Chairman. We have presently underway, as I mentioned earlier, a plan to stop the financial accounting services, except for our payroll service, that we are getting from them, and that will save us some money.

Mr. DANIELSON. I was wondering because it seems that nothing goes down, and if you are cutting down here, I just want to be sure that it was not a misstatement.

Mr. BABCOCK. It isn't, Mr. Chairman. I did bring along, in case anybody had any detailed questions, our monthly report.

Mr. DANIELSON. I don't mind having it. Is it one sheet or two sheets?

Mr. BABCOCK. It is three sheets. It is the most recent one.

Mr. DANIELSON. Is there any objection to including it in the record?

If there are no objections, it might be of value to include it in the record, but let's not go through it. I am not capable of absorbing that much detail, I am just trying to get the broad outline.

Mr. BABCOCK. Of course not, but I just thought it might be of interest. This is a document that we prepare internally.

Mr. DANIELSON. It may be, and so without objection, it will be received in the record.

[The monthly report follows:]

ACUS BUDGET STATUS REPORT
JANUARY 31, 1982

	(1) Budget Authority	(2) Obligations to Date	PROJECTIONS (3) Estimated Additional	(4) End of Year Projection	(5) Balance (1)-(4)
1. STAFF SALARIES (as of pay per. end. 1/23/82)	$				
a. Permanent	$ 627,000	$ 196,601	$ 439,542	$ 636,143	$ -9,143
b. Other than Permanent Temporary/part time Per diem consultants	28,000	12,005	16,889	28,894	-894
c. Benefits	59,000	19,004	43,579	62,583	-3,583
Totals	$ 714,000	227,610	500,010	727,620	-13,620
2. COMMUNICATIONS, UTILITIES AND OTHER RENT	57,000	25,557	36,440	61,997	-4,997
3. SLUC (Office rent, parking)	103,000	51,328	52,218	103,546	-546
4. TRAVEL	40,000	8,085	23,569	31,654	+8,346
5. PRINTING/PHOTOGRAPHY	36,000	5,718	35,650	41,368	-5,368
6. ADMINISTRATIVE EQUIPMENT	7,000	254	ø	254	+6,746
7. SUPPLIES, MATERIALS & EQUIPMENT	38,000	10,005	19,928	29,933	+8,067
8. OTHER SERVICES:	56,000	30,122	23,258*	53,380	+2,620
Research Contracts					
Other Contracts		(30,122)	(23,258)*	(53,380)	
TOTALS	$ 1,051,000	$ 358,679	$ 691,073	$ 1,049,752	$ +1,248

EXPLANATION OF PROJECTIONS

1.a. Permanent salaries: $24,419 avg.payroll x 18 pays (1/24-9/30/82) $ 439,542

b. Others: $1,318 avg. payroll x 2.5 pays ($3,295))
$877 x 15.5 pays (less Gregg on 3/1/82) = $13,594) 16,889

c. Benefits: Permanents - $439,542 x 9.3% = $40,877)
Others - $16,889 x 6% = 2,702) 43,579

* After dropping GSA Finance and other services.

DATE PREPARED: 2/3/82 (NBS)

EXPLANATION OF PROJECTIONS (Continued)

2.	COMMUNICATIONS, UTILITIES & OTHER RENT Xerox 4000 ($300 x 8 mos) = $2,400 9400 ($1,800 x 8 mos) = $14,400 Telephone: Local ($720 x 7 mos) = $5,040 Long distance ($158 avg. x 9 mos) = $1,422 FTS (2 qtrs.) = $11,146 Postage: $196 x 8 mos = $1,568 Express - 4 qtrs. = $464	$ 36,440
3.	SLUC - Office rent, 2 qtrs. = $50,068) Parking, 2 qtrs. = $1,260)	51,328
4.	TRAVEL Plenary (Dec., unvouchered) = $5,000 Plenary (June?) 7,000 ACUS staff 3,000 Consultants ($459 avg. x 8) 3,672 Pub. Members ($530 avg x 8) 4,240 Council ($73 avg x 9 mos) 657	23,569
5.	PRINTING/PHOTOGRAPHY Federal Register - 3 qtrs. x $3,750 = $11,250 Code Fed Regs - 3 qtrs. x $1,500 = $4,500 Photography= $600 ALJ Manual = $3,800 Annual Report = $5,000 Other Misc. printing = $10,200 (?)	35,650
6.	ADMINISTRATIVE EQUIPMENT	Ø
7.	SUPPLIES, MATERIALS & EQUIPMENT Office supplies ($1,202 avg. x 8 mos) = $9,616 Library ($1,289 avg. x 8 mos) 10,312	19,928
8.	OTHER SERVICES	23,258
	*GSA Contract ($47,000, less accounting & other services for 3rd & 4th quarter (Acct. $18,500/$1,541 mo. x 6 mos. = $9,246) 3rd & 4th qtr = $23,500 less $9,246 = $14,258 (Should be lower; when GSA provides us an actual figure)	(14,258)
	OPM Training = $1,000	(1,000)
	Miscellaneous purchase orders (avg. $1,000 x 8 mos.) = $8,000	(8,000)

ACUS BUDGET STATUS REPORT AS OF 1/31/82 - ACTUAL OBLIGATIONS TO DATE - 3 -

Budget Authority - $1,051,000
1st & 2nd qtrs. $536,112

1. PERSONNEL COMPENSATION & BENEFITS (thru 1/31/82) = $ 227,610

2. COMMUNICATIONS, UTILITIES & OTHER RENT 25,557
   Equipment rental: Xerox 4000 = $1,200
   " 9400 = 7,200
   " " - GSA furn/eqpmt = 1,200
   Telephones: Local (thru Feb.) + $3,600
   " - Long distance " Deb. = $509
   " - FTS (2 qtrs.) = $11,146
   Postage: (thru Jan.) = $702

3. STANDARD LEVEL USER CHARGES (SLUC) 51,328
   Office rent (2 qtrs) = $50,068
   Parking -(2 qtrs) = $1,260

4. TRAVEL 8,085

ACUS staff	$ 1,419
Consultants	1,836
Public Members	2,115
Council	220
Plenary Session	2,495

5. PRINTING/PHOTOGRAPHY 5,718
   Federal Register (1 qtr) = $3,750
   Code Fed Regs (1 qtr) = $1,500
   Other printing = $35
   Photography = $433

6. ADMINISTRATIVE EQUIPMENT 254

7. SUPPLIES, MATERIALS & EQUIPMENT 10,005
   Office supplies = $4,809
   Operating supplies - $40
   Library = $5,156

8. OTHER SERVICES 30,122
   GSA Admin. suppcrt (2 qtrs x $11,750 per)= $23,500
   Health room = $800
   Miscellaneous purchase orders = $5,826
   Research contracts = $

TOTAL OBLIGATIONS $ 358,679

Mr. DANIELSON. That will be monthly for what month or months?

Mr. BABCOCK. It is for the month ending January 31, 1982. The February report is not yet finished, it will be by the end of this week.

Mr. DANIELSON. For the month of January 1982?

Mr. BABCOCK. Yes, sir.

Mr. DANIELSON. I just wanted to identify it for the record.

Mr. KINDNESS. Mr. Chairman, I do have one other question, now.

Mr. DANIELSON. Certainly.

Mr. KINDNESS. What happens, in the experience of the conference, when you are dissatisfied with the work product of a contractor for research services. It is a highly variable sort of thing, so would you go into that a little bit?

Mr. SMITH. I will go over my experience. In the recent past, we have had, at least in my tenure, no significant problems with people that we have contracted. In the past, we have terminated contracts. We have had the problem of a contractor who really doesn't produce his study and, therefore, will get no payment, and we will end the contract at that point.

One of the difficulties the conference has always had, because of our budget limitations, is that the contracts are usually not the highest priority on the academic contractee's schedule. Just because of the amounts, we can't demand that kind of priority, and they will usually do it on a break, or a summer project, or a fill-in project.

However, if that becomes too low priority, we can and we have terminated contracts, and with that money we will try to find some other contractor who can do the job and complete the transfer, and transfer the contract to that individual.

Mr. KINDNESS. Thank you.

Mr. DANIELSON. Can you tell me how many research contracts do you have pending currently?

Mr. SMITH. I will defer to my research director. My estimate is somewhere in the range of 20.

Mr. LUBBERS. Twenty to twenty-five, I think.

Mr. DANIELSON. How long have you been with the conference?

Mr. LUBBERS. I have been with the conference for about 6½ years.

Mr. DANIELSON. With that length of experience, is that above, below, or about standard for pending contracts?

Mr. LUBBERS. I think it is about standard for the number of contracts in our pipeline.

Mr. DANIELSON. About how long does the average contract last, what is the timespan?

Mr. LUBBERS. About a year. We usually try to stay within a year.

Mr. DANIELSON. So from that I can infer properly, I believe, that each year you probably grant 20 new contracts and you close out 20 old ones, I would imagine.

Mr. LUBBERS. That would be a good inference. I am not sure that is exactly the case, but maybe 15 to 20 a year.

Mr. DANIELSON. I see.

Judging from the figures that you have given us, the dollar value per contract doesn't average very much, then?

Mr. LUBBERS. That is correct.

Mr. DANIELSON. Give us a span, if you would, sir, of how much are these contracts worth?

Mr. SMITH. We let two recent ones for $500 a piece, which set some kind of all time low record in Washington.

Mr. DANIELSON. What kind of an all time high have you set?

Mr. BABCOCK. The largest contract that we ever let was for a very massive study of the Federal Trade Commission Magnuson-Moss rulemaking proceeding, which was mandated in the Magnuson-Moss Act. Congress told us to do this. Our total payout, as I recall, over a 5-year period was $420,000.

Mr. DANIELSON. That was over a 5-year period?

Mr. BABCOCK. Yes, sir. That was the grand champion.

Mr. DANIELSON. You are talking about less than $100,000 a year?

Mr. BABCOCK. Yes, sir. Whereas our average contract is between $7,000 and $8,000 at the moment on the books. I think the highest one on the books at the moment is for $40,000, and the average much lower. They go all the way down to $500.

Mr. DANIELSON. The $40,000 contract must have a longer lifespan than 1 year, because you have not had $40,000.

Mr. BABCOCK. That is right. That contract was let with 1980 money, and I believe it was in August of 1980 that Fred Emery's contract was let. The contract schedule calls for delivery of a first draft of the last part of the product this coming June. We are hoping to have something out of that contract for the plenary session in December. If our hopes are realized, that contract will be over in December of this year, and it, therefore, will have had a total life of a year-and-a-half.

Mr. LUBBERS. It was let in September of 1980.

Mr. DANIELSON. If it was let in September of 1980, it would be 2 years.

Mr. LUBBERS. That is right.

Mr. DANIELSON. Do you notice these requests for bids, or whatever you call them, in the Federal Register?

How do you let the world know that you have a contract that you wish to let?

Mr. BABCOCK. They are individually negotiated with the contracting officer. We solicit, of course, inquiries from would be contractors, but we get very few.

Typically, we first decide that we want to let a contract on a particular subject, and then we try to find somebody who is experienced in the area, has a good reputation, and is interested in doing the work. Our contractors are typically academics, and they will do it not so much for the money as because they want to do something in the particular area, and they want to do a contract for the Conference which carries some prestige.

Usually, we have many more good topics that we would like to get into than we can find contractors who are willing and able to do the work.

Mr. DANIELSON. When you have a proposed contract, I presume you have attached a dollar figure to it that you are ready, willing and able to pay, $500 or $5,000 or whatever it may be.

Mr. LUBBERS. That is correct, we do have a compensation clause in our contract, and we usually stage it by different performances.

Mr. DANIELSON. But you put the dollar value on yourselves, is that correct?

Mr. LUBBERS. Yes.

Mr. SMITH. We try to estimate how much time we think this project is going to take. Then we also make some judgment as to how much work the person has done on it. The person that we may contract with may have a book in progress, so it may not require as much time.

Mr. DANIELSON. You are talking about the qualification of the person now?

Mr. SMITH. The qualification, but that may affect the price. If the person is already doing a book on the subject, he may have to spend less time on getting the project done than someone who has to start from scratch on the area.

Mr. DANIELSON. Who attaches the dollar figure to it? The chairman does, I suppose.

Mr. SMITH. Ultimately, yes. I get advice from my experts.

Mr. DANIELSON. You are the man who really pulls the laboring oar on that, I would imagine, aren't you?

Mr. LUBBERS. Right now, I am, that is correct.

Mr. DANIELSON. So you sort of evaluate the job you need to have done, and hope that you will be able to get a competent contractor for *x* dollars. Is that the way you do it?

Mr. LUBBERS. That is the way we approach it, and then we discuss it with the potential contractor. Then I give my recommendation to the chairman.

Mr. DANIELSON. Do you ever have keen bidding competition between more than one contractor for these research projects?

Mr. BABCOCK. I wish we did, Mr. Chairman, but it has never happened.

Mr. DANIELSON. The expression on your face is more eloquent than your words. I gather you do not.

Do these research projects frequently result in some recommendation from the council or from the entire Conference?

Mr. SMITH. They frequently do. The object of most of them is to produce some recommendation, but not all of them. There are certain topics that we feel might be of general interest, not necessarily leading to recommendation. But the intent is that most of them will end up as a recommendation of the Conference.

Mr. DANIELSON. But the work product of the research, at least, is considered by the conference, I assume; is that correct?

Mr. SMITH. Yes, that is correct.

Mr. DANIELSON. For whatever decision they want to take on it.

That is about all I can ask you on research contracts. You are really not dealing with a massive supply of money there.

Mr. SMITH. Unfortunately not.

Mr. KINDNESS. Mr. Chairman.

Mr. DANIELSON. Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

Not directly with regard to contract research, but the other side of the picture. How would you characterize the percentage of research that is done through contract as compared to that which is done in-house? I realize that that may be difficult to quantity, but could you give us a notion of what it is?

Mr. SMITH. In-house, in addition to the three individuals sitting here and myself, and we all do a little bit of research, we have six staff attorneys. Part of the staff attorney's research function is to work with the contractor, so each contractor is generally assigned to a particular committee of the Conference with a staff liaison, and that staff liaison works with the contractor as kind of an editor, and research resource, and otherwise helps the contractor.

The staff has been doing several projects. One is a rulemaking manual, an A to Z on how to make rules, an annotated rulemaking manual. It is difficult to quantify it in terms of out put because the staff functions tend to be more support rather than a total research project on our own, with few exceptions like the research manual.

There was one contract that we had to cancel, and Jeff has taken over that contract as an in-house staff project. So we get that function as well.

Mr. KINDNESS. First of all, it is difficult to draw the line between support functions and the research.

Mr. SMITH. Yes.

Mr. KINDNESS. But you would not call it 50-50 by any means?

Mr. SMITH. No, I would not call it 50-50. The outside research function is probably the majority. Again, with some contractors, the outside function may be closer to a partnership, and with others it may be very minimal technical support.

Mr. KINDNESS. Thank you.

Mr. DANIELSON. Let's move on to question 6, if I may, as to whether your Conference should serve principally as an advisory committee on administrative law matters, or into questions of substantive law.

The reason I asked the question, I recall at our last hearing, a comment was made to the effect that you are thinking about getting into changing the Federal Tort Claims Act, or changing a subject matter which properly belongs to the Federal Tort Claims Act.

Your answer is really quite explicit, and I really can't ask you many questions there. Maybe I will ask you one very pointedly. Why would you get into the Federal Tort Claims Act sort of thing?

Mr. SMITH. That seems like an important act affecting the way in which the Government operates, rather than affecting subject matter jurisdiction. It affects the efficiency and effectiveness of administrative agencies. If Government officials are afraid of being sued because of decisions they make, it seems to us that that is a very basic administrative problem that the Government has and that comes within our mandate.

Mr. DANIELSON. I believe I see the direction in which you feel you are pointing.

I certainly hope my colleagues will correct me if I state this incorrectly, under the proposed changes in the tort law to which you have referred, the chilling effect of exposure to civil law suits inhibiting governmental action by persons who are duty-bound to take action.

We have been holding hearings on that subject matter for quite some time, and I can assure you that the agencies involved do not hesitate to tell us about the burden this places on their activity. Not only did the Justice Department let us know very clearly, but

so do the agencies who are most generally exposed to that sort of thing.

I personally consider it more or less substance because to the extent that we modify the Tort Claims Act, we are in effect lifting sovereign immunity to some extent here, there, or the other place, and permitting an action to come in, which is substantive law.

Mr. SMITH. I could see that point. I really, in responding to the question, think that there is almost a third possibility. The Conference really isn't like a separate advisory committee to the Government. We are a forum for all the agencies of the Government, so we really act in some ways as expressing common concerns.

It may be substantive within the context of one agency, but our contribution, I think, is a unique contribution to the system. We can take something that in one agency may have a very sharp ideological substantive content, but by talking to all the agencies, we remove that element of it and look at it also as the procedural which may affect agencies across the board.

I know that if one of the regulatory agencies, the ICC, makes a procedural change, immediately you have in the press, the industry saying, "whose ox is that going to gore?" and consumers saying, "whose ox is this going to gore?" But if the Conference does something that cuts across 20 or 30 agencies, then it doesn't have any subject matter implications. It is seen purely as a procedural change.

Mr. DANIELSON. Anyway, under present budgetary restraints, with 20 projects going, and I presume 20 in the incubator of some kind of another, you really are not going to have much time to spend on this tort pursuit, I don't believe. Am I more or less right on that?

Mr. SMITH. We have a contract out on that matter.

Mr. DANIELSON. Your have a contract now?

Mr. SMITH. We have a contract now, which has been let as of September 1981.

Mr. DANIELSON. Would you tell us a little bit about that. Who has it, and what is the goal?

Mr. LUBBERS. This contract was let to Thomas Madden, who is a former official of the LEAA, and is also active in the Federal Bar Association. He is a private attorney with a law firm, rather than an academic consultant. We were able to procure his services for $10,000.

He is going to prepare an outline, in fact he has already prepared a preliminary outline for us on the subject, which we will be happy to make available to you.

Mr. DANIELSON. What subject is this?

Mr. LUBBERS. Government officials liability.

His draft report is due July 1, and his final report is due September 1. We hope, if everything goes well, probably have it ready for our December plenary session.

Mr. DANIELSON. When was the contract let?

Mr. LUBBERS. It was September 1981.

Mr. DANIELSON. He has been on it for almost a year.

Mr. LUBBERS. That is right.

Mr. DANIELSON. The report is to be turned in when, did you say?

Mr. LUBBERS. The draft report is due in July of this year, and the final report is due in September.

Mr. DANIELSON. So it would be a 1-year contract?

Mr. LUBBERS. That is right.

Mr. DANIELSON. What fiscal year did that $10,000 come out of?

Mr. BABCOCK. Fiscal year 1981, Mr. Chairman.

Mr. DANIELSON. How much did you have available for research in 1981?

Mr. BABCOCK. $140,000 in 1981, sir.

Mr. DANIELSON. When it comes in, I hope you will make at least a copy of it available to this committee because it is a very, very complex and difficult issue. It might be interesting to see what this gentleman has to say about it, anyway.

Mr. MCCLORY. If the chairman would yield.

Mr. DANIELSON. Yes, sir.

Mr. MCCLORY. I think it would be helpful if you also made available copies of it to the judiciary.

Mr. DANIELSON. To the courts?

Mr. MCCLORY. Yes.

Mr. DANIELSON. I think you are right, Mr. McClory.

Mr. MCCLORY. I don't want you to be without it, Mr. Chairman.

Mr. DANIELSON. I will have a few contacts left here.

[General laughter.]

Mr. DANIELSON. I think the committee, quite frankly, would find it interesting to find out what this gentleman has to say.

Mr. Kindness, do you have anything on that?

Mr. KINDNESS. Mr. Chairman, I don't have anything that is directly on that, but related to question No. 6. Over recent years, enactments by the Congress whereby you authorize in the statute an administrative procedure that is specified with some particularity that differs from the Administrative Procedure Act. Where that occurs, of course, the enabling statute would be controlling.

I don't know that this could be said to be established as a trend, although I guess I have said that, but I am wondering if there has been any observation, or a study, or interest in this phenomenon on the part of the Administrative Conference, and whether there might be any information available to the Conference with regard to that particular trend.

Mr. SMITH. Let me make a couple of observations, and then let me ask Dick Berg, our general counsel, to comment on that, if that is all right.

I think the Conference can play an important role in that trend. One of the proposals that has been made in the past is that the Conference serve as a source of uniform procedural rules.

Right now, I guess, each agency has more or less a unique set of procedural rules, with the practice, as you have noted, having advanced in creating special procedural rules to meet various fact situations. I think the Conference might well be given the task of drafting at least model procedural rules for all Federal agencies to adopt.

Under the Equal Access to Justice Act, we were given this role of drafting at least model regulations for the Equal Access to Justice Act, and I think we brought some uniformity to the procedures in the Government which ultimately saves a lot of money in litigation

costs. In the area that you suggest, I think we could expand our participation under the Equal Access to Justice Act, which is generally viewed as very successful.

Mr. BERG. The phenomenon that Congressman Kindness alluded to was commented on some years ago by our former chairman, Antonin Scalia. He referred to it as the "Balkanization" of administrative procedure, with each particular statute having its own procedural code.

We have tried, both in terms of our recommendations generally, and the sort of advice, formal and informal that this office has given, to discourage it as much as possible because we think that the Administrative Procedure Act is intended to be the general charter and there are some very definite advantages to the agencies, to practitioners, to the courts, most of all perhaps, in having a fairly uniform set of statutory principles governing agency procedure.

The problem has been—I am thinking particularly now of informal rulemaking—that the Administrative Procedure Act is just not acceptable in present form to the Congress, and frequently to the courts. So that you get a considerable demand for more procedure. The tendency is for Congress to put on additional procedures, plus what the APA requires.

I suppose one answer is the pending regulatory reform legislation to attempt to address on a general basis some of these concerns.

It is a considerable problem because one of the reasons why the Administrative Procedure Act has been amended so little since it was enacted in 1946 is that it is exceedingly difficult to be more specific, and still apply your principles across the board.

Mr. KINDNESS. To be specific in general terms is always difficult.

Mr. BERG. The more you require in the Administrative Procedure Act of all agencies, the more hard cases you are going to find. So there is that tension. It may be that in particular statutes you have got situations which call for additional procedures. There is this constant tug of war.

At least, we have exerted our efforts to try to get Congress and the administration, when they are drafting legislation, not to make new wrinkles and curlicues, except to meet really felt needs.

Mr. KINDNESS. Much of thought and query-comment in this area seems to be directed toward informal rulemaking. But I worry a bit about whether we have directed as attention as perhaps is appropriate to adjudicatory proceedings, and to investigatory proceedings.

I have not really formulated a question, except that I would like to elicit your comments as to what, if there is anything in the thinking of the Administrative Conference, about the other areas of administrative law that we have not been giving as much attention because all the focus is on informal rulemaking.

Mr. BERG. You may recall that several years ago the thrust of the regulatory reform legislation, particularly the legislation that came out of the Ribicoff committee in the Senate, was on expediting formal proceedings, particularly formal adjudication.

We had, as part of our very modest joint legislative package with the American Bar Association, several recommended amendments

in that area. However, in the past 3 or 4 years, as you point out, the emphasis has switched to informal and hybrid rulemaking proceedings, and these various provisions have just dropped out of prominence.

For example, our particular recommendations, urged jointly with the bar association, are for a general subpena provision as part of the Administrative Procedure Act provisions on formal proceedings. We have urged a provision with respect to certiorari-type review, and a review by intermediate employee review boards.

I would concede that neither of these is an earthshaking provision. They would tend to fill in some gaps for a few agencies which do not have adequate statutory authority in their organic legislation. But these are a couple of examples that are the sort of generalizations that we feel would work across the board in formal proceedings, largely formal adjudications.

With respect to one of the other thrusts of the Ribicoff committee bill, which was to make a little less formal, to expedite certain proceedings, I think our thinking is that most of this, if not all of it, can be done under the existing APA if it is aggressively used. The projects that Jeff Lubbers has inherited had as its goal to test out whether the agencies could expedite their formal proceedings without new legislation. This is the area where people have been looking at improving the APA's adjudicatory procedures.

Mr. KINDNESS. Thank you.

Thank you, Mr. Chairman.

Mr. DANIELSON. Thank you, Mr. Kindness.

Following up very briefly on that. I think there is one observation I have made throughout our work on regulatory administrative procedures and regulations, and that is that the role of the Congress ordinarily is to provide the generalities, which as you say are harder to state in specific terms.

Mr. KINDNESS. It is like jumbo shrimp.

Mr. DANIELSON. Or dehydrated water. [General laughter.]

Mr. DANIELSON. That traditionally is deemed to be our role, to state the broad outlines and allow the executive and administrative agencies to fill in the details. Yet, the public outcry against regulations is almost invariably directed on agencies putting in details that the Congress did not intend that they put in in the first place.

So, I guess we do have to be generally specific in order to make sure that the agencies are, first of all, appropriately guided as to what are the parameters within which they operate, and what is the direction of their operation. Yet, if we go too far, we bog ourselves down in the first place, and we may impose obligations on agencies which in the real world they just simply cannot carry out. It is kind of a delicate balance to work out.

Maybe you cannot have a general rule. Maybe in some subjects, the Congress must be very specific and leave a lesser degree of discretion to the agencies, while in other subject areas the Congress can afford to be quite general, nonspecific, and leave a greater discretion for the agency.

I don't know where the answer is, but lately we have had a little testimony relating to air crash disasters. The judicial people have told us that if we should have a Federal cause of action, they would like to have us spell out in very great detail what would be the

measures of damages, what would be compensable losses, et cetera, because if we do not, then the courts are going to have to, in effect, legislate to fill in those gaps.

It is a very delicate balance, and happily you are only concerned on the administrative law side of it. Your suggestions are welcomed by this committee, and we try to do something with them here anyway.

Now, I am going to move on because we have other things to do. We want to get you some money authorized, for one thing.

Just before we got into the last question on money, you said, sir, that the square footage of this room is about the square footage which you folks occupy. Did I misunderstand that?

Mr. BABCOCK. I said that, Mr. Chairman.

Mr. DANIELSON. We are talking about approximations.

Mr. BABCOCK. Yes, sir. We have 6,200-odd square feet in our space, and I would guess that it is about the floor area of this room.

Mr. DANIELSON. You are thinking about picking up another little closet or something.

Mr. BABCOCK. No, it is not a closet. It is a good size room.

Mr. DANIELSON. Just so the record is clear, this is 2237 of the Rayburn for whoever may read this several years from now.

Mr. BABCOCK. We could not afford the rent for this room, sir.

Mr. DANIELSON. You have 21 permanent employees, which includes the chairman.

Mr. SMITH. We have 18, Mr. Chairman, and three part-time employees, and one left us last week. So we have two part-time employees.

Mr. DANIELSON. You have a vacancy.

Mr. SMITH. We have a total of 21 full-time permanent positions allowed for this current fiscal year.

Mr. DANIELSON. Out of those permanent 21 positions, two of them are permanent part time?

Mr. BABCOCK. One of them is a permanent part time, sir.

Mr. DANIELSON. I notice also that under your personnel summary, you have an average SES salary of $50,112.

Mr. BABCOCK. For last year, that is correct.

Mr. DANIELSON. For this year, it is $58,500.

Mr. BABCOCK. That is correct. There are only two persons in SES at the moment.

Mr. DANIELSON. What is the lowest, and what is the average?

Mr. BABCOCK. There are two of us, and we are both at $58,500.

Mr. DANIELSON. The average, then, must be $58,500.

Mr. BABCOCK. Yes, sir.

Mr. DANIELSON. Mr. Chairman, what is your executive level?

Mr. SMITH. I am a level 2.

Mr. DANIELSON. I am wondering because you are the head of a conference, and I am noting that in title V that the head of this Conference should be paid at the highest rate established by statute for the chairman of an independent regulatory board or commission. If I look at the other portions of title V, that would put you in executive level 2.

Mr. SMITH. That is correct.

Mr. DANIELSON. You may be worth far more than executive level 2. I am not debating the merits here, I am just wondering in the

scheme of things. You have 21 permanent employees, of which at least one is a part-time permanent employee. You have 6,000 square feet of space that you occupy. Yet, in level 2, we are at the immediate next to the Cabinet level. Your compensation would be the same, for example, as the Director of Central Intelligence Agency.

Mr. SMITH. My former boss.

Mr. DANIELSON. You are catching up with him. The Administrator of the Federal Aviation Agency, the Deputy Secretary of State, the Administrator of the National Aeronautics and Space Administration. You would be on the same par as Mr. Schmults down at the Justice Department.

Mr. SMITH. Yes, and Mr. Schmults is one of our council members.

Mr. DANIELSON. The Chairman of the Council of Economic Advisors, and the Director of OMB. Do you mean that Dave Stockman doesn't get any more than you?

Mr. SMITH. He gets more publicity which compensates for it. [General laughter.]

Mr. DANIELSON. I will concede that. We might get you something in the Pacific Monthly, but I am not sure about that. [General laughter.]

Mr. DANIELSON. Anyway, in section 53.13, I happen to run my eye over level 2, the Director of the Office of Personnel Management. Some of these are quite responsible jobs. I don't mean to say that you are not doing a responsible job, but I just wonder if, in the scheme of things, the Chairman of the Administrative Conference really does rank at just below the very top level. It kind of bugs me a little bit.

Mr. SMITH. I thought of that when the President asked me to take the job. I served as counsel to his campaign, and I worked with a number of the people in other agencies. As a law professor, you are not particularly status conscious. I guess you have your own status. There are two classes, the teachers and the students.

I think that it makes some sense in that the Conference's great strength is not its money or its power, since we have little of either. But it is its credibility and its status. The council, in that sense, two of the members are level 2, and two are heads of independent agencies, which I guess makes them level 3, and one is a department general counsel, which I think is a level 4. So it makes some sense, I think, to give the chairman status, although I might prefer to have money or power.

Mr. DANIELSON. I will not debate this. I will talk about this publicity you were talking about, which is a psychological compensation, I guess.

A level 3, which would be at a lower level than your own level, I notice we have the Solicitor General of the United States who is in charge of arguing cases before the U.S. Supreme Court, and representing the United States of America in appellate matters. It is a pretty big job, the way I look at it.

The Administrator of General Services, who is the one who gives you that tough contract you have to absorb every year, is at a lower level. The Administrator of the Small Business Administration, the Chairman of the Civil Aeronautics Board, the Chairman

of the Federal Communications Commission, they are all at a lower level than you.

Mr. SMITH. May I add, Mr. Chairman, the Chairman of the Federal Communications Commission served as my communications counselor in the campaign and is one of my closer friends, and this gives me a leg up. So this is one important fringe benefit.

Mr. DANIELSON. I don't want you to lose any friendships over this.

When I look at the Chairman of the Board of Directors of the Federal Deposit Insurance Corporation, the Director of the Federal Bureau of Investigation, who does have a lot of responsibility, the Deputy Director of the Bureau of the Budget, members of the Nuclear Regulatory Commission, the Chairman of the Securities and Exchange Commission. I am not fighting with you here, sir, but the Comptroller of the Currency, the Commissioner of Internal Revenues. I am just concerned that maybe when we drew up this base law that we didn't keep balance in mind well enough, that is truly a concern.

Mr. BABCOCK. May I comment on that, sir?

Mr. DANIELSON. Yes.

Mr. BABCOCK. The legislative history of the original Administrative Conference contains a fairly extensive discussion of this very question. The theory was that the Chairman of the Conference ought to be at least equal in stature or status, if not higher, than all of the independent regulatory boards and commissions because that would give greater credibility to the advice that the agency was giving those bodies, and greater credibility to the Chairman when he has to preside over meetings of members and general counsel of all those departments and agencies.

It was the original theory that he was supposed to be quite high ranking.

Mr. DANIELSON. I understand that, sir, and I am certainly not debating with you on it at all. I really bringing this out more for the benefit of the information of the committee. I don't want to pick a fight with any of you, gentlemen, you are much too fine people for that.

I wonder, in our sense of proportion, whether a chairman of a small conference such as this, with a maximum of 21 authorized permanent employees, should draw a greater compensation, for example, than the Director of the Federal Bureau of Investigation, and a number of others whom I have mentioned here. The Chairman of the Securities and Exchange Commission, obviously, has tremendous burdens to carry.

So I am just bringing it to the attention of my committee more than anything else. We certainly have at this time no bill before us to make a change, but I think this is certainly a subject that we should think of.

I would like to ask you this, in view of your testimony a couple of minutes ago, where do you reside, isn't it in Delaware?

Mr. SMITH. I have a house, which my wife and I have purchased in Arlington, and we are in the process of getting it livable. It has some damage that we discovered after we bought it, which was very extensive structurally. So I am commuting now between the house in Arlington, where I spend most of my time, and see my

family on weekends while we are in the process of selling the house in Delaware.

Mr. DANIELSON. In other words, you have been living in Delaware, but you are moving to the Washington vicinity.

Mr. SMITH. I already live in the one room of the house that I have shielded off from the construction. My wife came down this weekend and was appalled, she said, by the rubble, and we are getting cleaned up.

Mr. DANIELSON. I am glad that it is only the rubble that appalls her.

Mr. SMITH. No. I will occasionally spend some time in Delaware. My schedule has been flexible on that. I spend whatever time I can arrange, from 4 or 5 days a week here, and spend 2 days a week in Delaware.

Mr. DANIELSON. Do you still have gainful employment in Delaware? You are a teacher, as I understand it.

Mr. SMITH. I am a professor. I teach 1 night a week. When I am up there, usually on Monday night I teach a course for 2 hours.

Mr. DANIELSON. But you put in 1 day a week in connection with your academic work at the law school?

Mr. SMITH. No. The law school work occupies maybe 3 hours of my time a week. It is a course I taught before, and they asked me if I would do it. It is breaking the connection as gently as possible, I guess.

Mr. DANIELSON. Do you have any other outside employment?

Mr. SMITH. No.

Mr. DANIELSON. Just your teaching function?

Mr. SMITH. Yes.

Mr. DANIELSON. Do you, gentlemen, have any questions at this time?

Mr. MCCLORY. I would like to comment in this respect, in line with the chairman's questioning, which I think is entirely appropriate.

I had an opportunity to come in contact with the Chairman, Professor Smith, during the transition. I gained a tremendous respect for his background of knowledge regarding the entire administrative law field and the entire Federal bureaucracy. I just feel that the Federal Government is extremely fortunate to have him in his present role.

I regard the Chairman of the Administrative Conference as far more significant than merely the executive control of the limited number of employees in the conference. I regard it as being an agency or a part of the executive branch of Government which overseas and exercises some control and direction and guidance with regard to the entire burgeoning bureaucracy.

I think that it is an extremely important office. I don't think the salary level is excessive. I think we are indeed very fortunate to have Professor Smith in this office.

Mr. DANIELSON. Mr. Kindness.

Mr. KINDNESS. Mr. Chairman, I think the question raised by the chairman's line of thinking is very appropriate for us to consider, but I would like to suggest the turnaround in thinking that might some day occur, at least if one of my dreams occurs, whereby we start thinking of the executive managerial capacities in Federal

service as being more valuable as they supervise fewer employees. [General laughter.]

If some incentive could be built in in that way, I think that it would be extremely beneficial to the taxpayers' pocket. I must admit that I do have this built-in prejudice arising out of a dream that suggests that we really ought to turn our thinking around, and not consider the amount of space, accoutrements within it, and the number of employees as being determinative of the level of grades within which services are divided up.

I do believe that we could have some psychological problems in the functioning of the Conference if the arrangement were much different to what it is at the present. But it is very desirable to explore that sort of thing, and I thank the chairman for bringing it up because I had not really considered it.

Mr. DANIELSON. Thank you very much, Mr. Kindness.

I want to make one thing clear. In bringing out this point, I am not directly nor indirectly casting any question about your qualifications, sir. I am positive that you would not have been appointed without fine qualifications. I know that when my colleague over here, Mr. McClory, says what he just said, he says with sound factual basis.

I am not criticizing that. I only wanted to make clear that in a sense of propriety or proportion only, when I observed that you are in Executive level 2, which is equivalent to the Deputy Secretaries of Defense and State, the Chairman of the Board of Governors of the Federal Reserve System, the Secretary of the Army, the Director of the Central Intelligence Agency, and so forth, I was a little bit stunned since the Administrative Conference is, by default, is a smaller, less demanding responsibility than running the Air Force, or the Army, or the Central Intelligence Agency.

You are on a par with Mr. Schmults at Justice, the Deputy Attorney General, but you outrank the Solicitor General of the United States who has tremendous responsibilities, the Director of the Federal Bureau of Investigation who also is a busy man.

Without casting aspersion on your personal qualifications, I think that this committee could well look into whether or not we have this office of Chairman of the Administrative Conference appropriately within our schedule of compensation. That is really all I had to say on it.

Maybe I stand in awe of the Solicitor General because he is the Solicitor General, but to feel that he would be outranked by the Chairman of the Administrative Conference, it shocked me when I first saw it.

Mr. MCCLORY. If the chairman would yield.

Mr. DANIELSON. Yes, sir.

Mr. MCCLORY. Maybe we should change the level of the Solicitor General.

Mr. DANIELSON. You have a point there. That would change the proportion, but that might be difficult to do. Who knows.

I only have one remaining question. You have requested a 4-year authorization, and that is the bill I sponsored for you. What is your projected gross aggregate budget for each of the years within the requested authorization.

Mr. SMITH. Let me ask Steve to comment on this.

Mr. DANIELSON. Surely.

Mr. BABCOCK. We have no projections beyond 1983 because we don't have an authorization. We will intend to ask, if we get an authorization at the level proposed in your bill for that full amount from OMB for fiscal year 1984

Mr. DANIELSON. Thank you very much. In other words, so far as proposed budget is concerned, the only one you have worked out is the one that you left with us here for the coming fiscal year.

Mr. BABCOCK. That is correct, Mr. Chairman. Beyond that, our projections will depend on what your committee and your subcommittee and the House and Senate do.

Mr. DANIELSON. Mr. Moorhead, do you have any further questions?

Mr. MOORHEAD. I have no questions.

Mr. DANIELSON. Mr. Kindness?

Mr. KINDNESS. I have no further questions.

Mr. DANIELSON. Mr. McClory.

Mr. MCCLORY. No questions.

Mr. BABCOCK. Mr. Chairman, one other thing on the level of our Chairman and the number of employees he supervises. It is true that there are only 18 of us, but we are all very, very difficult to supervise. [General laughter.]

Mr. DANIELSON. That was well put, and I don't quarrel with that.

Mr. Kindness and his dream may have some merit. Perhaps if we just reduced the size of the Government, and then divided up the appropriation among those who survive, everybody would get a pay raise, and it might work out pretty well.

Bill Webster down at FBI, when he finds that you are outranking him on pay, he is going to want to come over to the Administrative Conference.

Mr. SMITH. No, he did get a pay raise and level 2 did not the last time.

Mr. DANIELSON. At level 3, he probably needed one.

Thank you very much.

As far as I am concerned, this concludes our oversight hearing. Are there any other questions?

Mr. SMITH. Mr. Chairman, if I could say one final thing.

I want to thank this committee. This committee has been very supportive of the Conference, and we hope that relationship will continue. We regret the Congress loss and the California judiciary's superb gain, and we hope that we will be able to continue to work with you in your new capacity.

Mr. DANIELSON. I am glad you said that. If my mother were still alive, she would like to hear that. My father would not believe it.

Thank you very much.

Mr. SMITH. Thank you.

[Whereupon, at 11:35 a.m., the subcommittee adjourned.]

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